

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.)
W.A. DREW EDMONDSON, in his)
capacity as ATTORNEY GENERAL)
OF THE STATE OF OKLAHOMA,)
et al.)

Plaintiffs,)

vs.)

CASE NO. 05-CV-329-GKF-PJC

TYSON FOODS, INC., et al.,)

Defendants.)

TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
OCTOBER 5, 2009
BEFORE THE HONORABLE GREGORY K. FRIZZELL, DISTRICT JUDGE
VOLUME VIII, P.M. SESSION

APPEARANCES:

For the Plaintiffs:

MR. W.A. DREW EDMONDSON
Attorney General
MS. KELLY FOSTER
Assistant Attorney General
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105

1 (APPEARANCES CONTINUED)

MR. M. DAVID RIGGS
MR. DAVID P. PAGE
MR. RICHARD T. GARREN
Riggs Abney Neal Turpen
Orbison & Lewis
502 W. 6th Street
Tulsa, OK 74119

MR. ROBERT A. NANCE
MS. SHARON GENTRY
Riggs Abney Neal Turpen
Orbison & Lewis
5801 Broadway, Extension 101
Oklahoma City, OK 73118

MR. LOUIS W. BULLOCK
MR. ROBERT BLAKEMORE
Bullock Bullock & Blakemore
110 W. 7th St.
Suite 770
Tulsa, OK 74119

MR. FREDERICK C. BAKER
MS. ELIZABETH CLAIRE XIDIS
MS. INGRID MOLL
Motley Rice LLC
28 Bridgeside
P.O. Box 1792
Mount Pleasant, SC 29465

18 For Tyson Foods:

MR. ROBERT W. GEORGE
Tyson Foods, Inc.
2210 West Oaklawn Drive
Springdale, AR 72701

MR. JAY THOMAS JORGENSEN
MR. THOMAS GREEN
MR. MARK HOPSON
MR. GORDON D. TODD
Sidley Austin LLP
1501 K St. NW
Washington, DC 20005

1 For Cargill:

MR. JOHN H. TUCKER
MS. THERESA HILL
Rhodes Hieronymus Jones
Tucker & Gable
100 W. 5th St., Ste 400
Tulsa, OK 74103

8 For Simmons Foods:

5 MR. DELMAR R. EHRICH
6 MS. KRISANN C. KLEIBACKER LEE
7 MR. BRUCE JONES
Faerge & Benson
90 S. 7th St., Ste 2200
Minneapolis, MN 55402

11 For Peterson Farms:

9 MR. JOHN R. ELROD
MS. VICKI BRONSON
Conner & Winters
211 E. Dickson St.
Fayetteville, AR 72701

16 For George's:

12 MR. A. SCOTT MCDANIEL
13 MR. PHILIP HIXON
MS. NICOLE LONGWELL
MR. CRAIG MIRKES
McDaniel Hixon Longwell &
Acord PLLC
320 S. Boston, Ste 700
Tulsa, OK 74103

21 For Cal-Maine:

17 MR. WOODY BASSETT
MR. VINCENT O. CHADICK
MR. JAMES GRAVES
MS. K.C. TUCKER
MR. GARY WEEKS
Bassett Law Firm
P.O. Box 3618
Fayetteville, AR 72702

23 MR. ROBERT SANDERS
24 Young Williams P.A.
P.O. Box 23059
Jackson, MS 39225
MR. ROBERT P. REDEMANN
Perrine McGivern Redemann
Reid Berry & Taylor PLLC
P.O. Box 1710
Tulsa, OK 74101

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PROCEEDINGS

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OCTOBER 5, 2009:

THE COURT: Mr. Green.

MR. GREEN: Yes, sir.

ED FITE,

having been previously duly sworn, was called as a witness and testified as follows:

CONTINUED CROSS-EXAMINATION

BY MR. GREEN:

Q. Mr. Fite, I'd like to ask you just a couple of more questions about this testing that was done on your property, sir. As a predicate to the question I'm going to ask, I want to just represent to you one more time that the two samples that were taken from your property were tested on April 15, 2008. If you'll just accept that as a benchmark date.

I want to ask you: At any time on or after that date of April 15, 2008, have you had any conversation whatsoever with any representative of the State of Oklahoma about the sampling on your property by plaintiffs?

MR. GARREN: Object to form to the extent it might lead to privileged communications with counsel, Your Honor.

THE COURT: Sustained, but the limited question, however, is as to whether or not Mr. Fite has had any conversation, that's a yes or no question. Mr. Fite, you may

1 answer that limited question.

2 THE WITNESS: Not that I'm aware of, no.

3 Q. (By Mr. Green) On or after April 15, 2008, have you had
4 any conversation with any representative of the State of
5 Oklahoma which related to possible reasons for any elevated
6 phosphorus levels detected on your property?

7 A. Yes.

8 Q. Pardon?

9 A. Yes.

10 Q. You have?

11 A. Uh-huh.

12 Q. And with whom did you have those conversations, sir?

13 A. I don't recall. Someone brought it to my attention
14 regarding sampling on the poultry waste on my land.

15 Q. And you don't remember who it is that mentioned this to
16 you?

17 A. I don't remember who exactly it was.

18 Q. Was it someone who was employed by the State of Oklahoma?

19 A. It was an attorney, I believe.

20 Q. An attorney?

21 A. Uh-huh.

22 Q. An attorney in this case, representing the State of
23 Oklahoma?

24 A. I believe so.

25 Q. Okay. And which attorney was that?

1 A. I take that back. I had a conversation with an attorney,
2 but I believe it was Dr. Fisher, Dr. Burt Fisher.

3 Q. Dr. Burt Fisher?

4 A. Uh-huh.

5 Q. When did this conversation take place?

6 A. I don't recall.

7 Q. Was it within the last --

8 A. Within the last year.

9 Q. -- six months?

10 A. The last year.

11 Q. Within the last year?

12 A. Uh-huh.

13 Q. Where were you and Mr. Fisher when you had this
14 conversation?

15 A. May have been a phone call.

16 Q. To your knowledge, were there any other individuals who
17 participated in that phone call?

18 A. I don't know.

19 Q. Not to your knowledge, then --

20 A. Not to my knowledge.

21 Q. -- is that correct?

22 Okay. What is it that Mr. Fisher told you?

23 A. That they found poultry waste signature on my property.

24 Q. Poultry waste signature on your property?

25 A. Uh-huh.

1 Q. Did he tell you any test results with respect to the
2 levels of phosphorus?

3 A. No, sir.

4 Q. You didn't ask?

5 A. No, sir, because I was -- previously had a soil sample on
6 my property that showed I had 44 pounds of phosphorus available
7 on the east side of the Highway 10 corridor through my property
8 and 66 pounds of phosphorus in the riparian area.

9 Q. That was years ago, correct?

10 A. No, that was two or three years ago, at most.

11 Q. So you didn't have any conversation with Mr. Fisher about
12 phosphorus levels; is that your testimony?

13 A. Not that I recall.

14 Q. Now, in response to another of Mr. Garren's questions last
15 week, you told us that the rodeo bowls had been fed with hay
16 harvested from fields where poultry litter had been applied.
17 Do you remember that?

18 MR. GARREN: Objection, Your Honor,
19 mischaracterizes. I think the testimony -- he's talking about
20 Mr. Fite's fields.

21 THE COURT: I don't believe so. Overruled. Go
22 ahead.

23 THE WITNESS: Yes.

24 Q. (By Mr. Green) When you gave that testimony, were you,
25 sir, trying to suggest that that hay that you've referenced is

1 or could be the cause if your property were to test very high
2 for phosphorus?

3 A. Yes.

4 Q. Can you shed any light -- any further light on why you
5 were asked about the source of feed for those rodeo bowls?

6 A. No.

7 Q. Did you discuss that question with anyone before you were
8 asked it -- let me rephrase it.

9 Did you know you were going to be asked that question
10 before you began your testimony last Thursday?

11 A. No.

12 Q. You did not?

13 A. Not that I recall.

14 Q. So your conclusion that you are providing a possible cause
15 if your fields tested high in phosphorus is something that has
16 come to you either last Thursday or since that time; is that
17 right?

18 A. No. I told you earlier that Dr. Fisher and I had visited
19 and immediately after that visit, I did some inquiries of my
20 own.

21 Q. You're talking -- are we talking about the same visit or
22 conversation with Dr. Fisher that you said occurred within the
23 past year that you've just testified to?

24 A. Uh-huh, yes, sir.

25 Q. And what investigation did you make of your own?

1 A. I leased my property to Mr. Dale Glory, who runs rodeo
2 stock, and inquired as to where his source of hay would have
3 come from.

4 Q. And you were motivated to do that because of your
5 conversation with Mr. Fisher; is that your testimony?

6 A. Yes.

7 Q. Then did you relate that conversation that you had with
8 the gentleman who leases your property to any of the lawyers
9 for the State?

10 A. Yes.

11 Q. And when was that?

12 A. Sometime in the last year.

13 Q. Can you pin it down any further?

14 A. No, sir.

15 Q. Can you tell me to whom you told that?

16 A. Rick Garren.

17 Q. Now, Mr. Fite, you were shown Exhibit 1079 which was moved
18 into evidence, which is the letter that was written on
19 letterhead of the State of Oklahoma Scenic Rivers Commission,
20 signed by you, the administrator, dated August 24, 2004, that
21 generally related to commercial fertilizer. Do you remember
22 that exhibit that you saw earlier?

23 A. Yes, sir.

24 Q. Now, that's not the only letter that you wrote to Mr. --
25 or, rather, to the State in 2004; is that not correct?

1 A. I've written several letters in 2004. I don't recall all
2 the letters and to whom they were written.

3 Q. Do you recall a letter written on April 28, 2004 to Steve
4 Thompson, the executive director of the Oklahoma Department of
5 Environmental Quality, telling him that the commissioners of
6 the Scenic River Commission had voted unanimously to adopt a
7 resolution opposing utilization of industrial or municipal
8 wastewater sludge for land application?

9 A. Yes.

10 Q. And did you enclose a copy of the resolution with that
11 letter; do you know?

12 A. That would have been -- there are no formal resolutions
13 that are signed. It's a motion that's made by the board in the
14 course of their actions.

15 Q. Let me show you what has been marked as Defendants' Joint
16 Exhibit 2211-002.

17 MR. GREEN: Can you put it up on the screen?

18 THE COURT: Is it admitted?

19 MR. GREEN: Here's a copy for Your Honor. May I,
20 Your Honor?

21 THE COURT: You may.

22 Q. (By Mr. Green) Do you recognize this as the letter you
23 wrote to Mr. Thompson in April of 2004, sir?

24 A. Yes.

25 MR. GREEN: Your Honor, I'd like to move the

1 admission of Joint Exhibit 2211.

2 MR. GARREN: Lack of relevance, Your Honor.

3 MR. GREEN: Relevance is that they made a
4 recommendation to the State concerning industrial sludge or
5 biosolid, and I want to elicit whether or not the State reacted
6 to this and did anything.

7 THE COURT: The objection is overruled. 2211 is
8 admitted.

9 Q. (By Mr. Green) Now, sir, after you sent this letter to
10 Mr. Thompson, did the State react to this letter and undertake
11 any specific action --

12 MR. GARREN: Objection, foundation.

13 Q. (By Mr. Green) -- if you know?

14 THE COURT: Overruled. Go ahead.

15 THE WITNESS: The Department of Environmental Quality
16 has not adopted a standard in response or a policy.

17 Q. (By Mr. Green) Now, did you ever forward to the executive
18 director of ODEQ, Oklahoma Department of Environmental Quality,
19 or any other Oklahoma agency any resolution from the Scenic
20 Rivers Commission pertaining to restrictions on cattle, whether
21 in the IRW or anywhere else in Oklahoma?

22 A. I do not recall.

23 Q. Well, do you think you did?

24 A. No.

25 Q. Did you ever forward to the executive director of ODEQ or

1 any other agency in the state of Oklahoma any resolutions from
2 the Scenic Rivers Commission pertaining to restrictions
3 regarding the application of poultry litter to fields and
4 pastures in the IRW or anywhere else in Oklahoma?

5 A. Don't recall.

6 Q. Don't you think you would recall if you forwarded to the
7 State a unanimous resolution adopted by your commission which
8 called for restrictions on the application of poultry litter?
9 That's not something you would remember?

10 A. I would want to say that I would remember it, but I don't
11 absolutely know for certain. As you saw earlier today, I had
12 to make a correction for the record because I overstated
13 something from last week.

14 Q. Mr. Fite, if I heard you correctly last Thursday, you
15 said -- I'm not purporting to quote you word-for-word -- but
16 what I recall, the essence of what you said is that the
17 Illinois River and other scenic rivers are the top tier of
18 water quality standards of our state, they are the best of the
19 best, they are the water bodies that the State does everything
20 humanly possible to protect.

21 Do you remember testifying to that?

22 A. Yes.

23 Q. I want to explore with you for just a couple of minutes
24 this concept of doing everything humanly possible to protect.
25 And my first question is, sir, to the best of your knowledge,

1 has the State of Oklahoma banned farmers from allowing cattle
2 to defecate in rivers and streams in the IRW?

3 A. Repeat the question, please.

4 Q. I will, sir. To the best of your knowledge, has the State
5 of Oklahoma banned or restricted farmers from allowing cattle
6 to defecate in rivers and streams in the Illinois River
7 Watershed?

8 A. I don't believe the Oklahoma Department of Agriculture has
9 prescribed such a rule.

10 Q. Has the State of Oklahoma -- and when I say the State of
11 Oklahoma, I'm embracing any agency of the State. Has the State
12 of Oklahoma banned farmers from allowing their cattle to graze
13 in the riparian areas of the Illinois River Watershed?

14 A. No.

15 Q. To the best of your knowledge, Mr. Fite, has the State of
16 Oklahoma banned farmers from placing mineral stands for cattle
17 in riparian areas?

18 MR. GARREN: Objection, Your Honor, no foundation,
19 mineral stands.

20 THE COURT: I know what he's talking about.
21 Overruled.

22 THE WITNESS: No.

23 Q. (By Mr. Green) To the best of your knowledge, sir -- and I
24 believe you've already acknowledged it, but let me just, once
25 again, make sure for the record -- has the State of Oklahoma

1 banned or limited in any way the amount of commercial
2 fertilizer that can be used in the watershed?

3 A. No.

4 Q. And I believe that we already confirmed, but let me pin it
5 down. To the best of your knowledge, sir, the State of
6 Oklahoma has not banned the application of poultry litter in
7 the Illinois River Watershed; is that not correct?

8 A. That is correct.

9 Q. Has the State of Oklahoma, to the best of your knowledge,
10 in the last ten years, done anything to adopt standards more
11 restrictive than the NRCS standards for the application of
12 litter in the IRW?

13 MR. GARREN: Foundation again, Your Honor.

14 MR. GREEN: Pardon?

15 MR. GARREN: Foundation.

16 THE COURT: Overruled.

17 THE WITNESS: The Oklahoma Scenic Rivers Commission
18 has. The agencies with jurisdiction have not.

19 Q. (By Mr. Green) Now, are you in a position to confirm that
20 you understand that the State would have authority to adopt
21 more restrictive standards than those set forth in the NRCS if
22 it wanted to?

23 A. Yes.

24 Q. Let me ask you this, sir. Is it true that for the last
25 ten years and continuing up until this very day, in nutrient-

1 limited watersheds, the State of Oklahoma has approved and
2 continues to approve Animal Waste Management Plans permitting
3 the application of poultry litter on soils with a soil test
4 phosphorus of up to 300?

5 MR. GARREN: Objection, Your Honor, misstates the
6 law. Mischaracterizes what the ODAFF does or doesn't do with
7 regard to approvals of plans. That's not what the law
8 requires.

9 THE COURT: Rephrase, please.

10 Q. (By Mr. Green) Does it issue plans -- has it issued plans
11 for the last ten years and up to today?

12 MR. GARREN: Same objection, Your Honor.
13 Mischaracterizes the law on the use of plans.

14 THE COURT: I believe the question is more limited.
15 Overruled.

16 Q. (By Mr. Green) Do you need the question again?

17 A. Please.

18 Q. I'm asking you whether, during the last ten years and
19 continuing up to today, has the State of Oklahoma approved and
20 issued Animal Waste Management Plans allowing for the
21 application of poultry litter on soils with an STP of up to
22 300?

23 MR. GARREN: Same objection, Your Honor.

24 THE COURT: Overruled.

25 THE WITNESS: I do not know. That question would

1 need to be referred to Dan Parrish at the Department of
2 Agriculture, Food and Forestry.

3 Q. (By Mr. Green) Mr. Fite, sitting here today, do you know
4 whether or not the State has ever revoked an Animal Waste
5 Management Plan?

6 A. No, I do not know.

7 Q. Do you know whether the State has ever sought to limit the
8 number of waste management plans that can be issued?

9 MR. GARREN: Your Honor, this is outside the scope of
10 the Scenic Rivers Commission's authority and responsibilities.

11 THE COURT: Sustained.

12 MR. GREEN: I am just trying to explore this "humanly
13 possible" concept, Your Honor.

14 MR. GARREN: He's not talking about a human. None of
15 his questions have asked about a human. He's asked about the
16 State.

17 THE COURT: Let me see if I can cut to the heart of
18 it. Do you know any of the answers with respect to these
19 Animal Waste Management Plans? Is that within your authority?

20 THE WITNESS: No, sir.

21 THE COURT: Go ahead.

22 Q. (By Mr. Green) Let me try this question, sir. To the best
23 of your knowledge, has the State compelled point-source
24 discharges to reduce their phosphorus discharge levels to meet
25 the 0.37 milligrams-per-liter goal?

1 A. Presently, no.

2 Q. In your view, would it have been humanly possible for the
3 State of Oklahoma to do all these things which you have
4 acknowledged in answer to these last few questions that it has
5 not done?

6 MR. GARREN: Objection again, Your Honor. This
7 obviously calls for agencies, State agencies, governing bodies,
8 not humans necessarily to do what he's asking to be done.

9 THE COURT: Overruled.

10 THE WITNESS: All wastewater treatment plants in the
11 Illinois River basin must meet a 1 milligram per liter
12 phosphorus standard. The 0.037 milligram per liter phosphorus
13 criteria that you mentioned becomes fully effective on June 30,
14 2012.

15 Q. (By Mr. Green) Maybe you misunderstood my question. I
16 took you through a series of questions where you acknowledged
17 that the State has not undertaken certain activity or certain
18 action. Do you recall these questions that I just asked you --

19 A. Yes.

20 Q. -- in the last few minutes?

21 And my question to you now is: Would it have been
22 humanly possible for the State to have taken that action which
23 you have acknowledged it has not?

24 MR. GARREN: Same objection, Your Honor.

25 THE COURT: Overruled.

1 THE WITNESS: As I stated earlier, the Oklahoma
2 Scenic Rivers Commission has done what we can within our
3 limited jurisdiction to do affirmative to those questions that
4 you asked, but there are a lot of those issues that are not
5 within our jurisdiction; and, thus, we have no authority.

6 Q. (By Mr. Green) I understand that, and I appreciate that.
7 But that really is not the question I'm asking.

8 A. Well, you're categorizing the entire state. And the
9 Scenic Rivers Commission has demonstrated that we are willing
10 to take a position when other agencies have jurisdiction.

11 Q. Do you feel that that answer is responsive to my question?

12 A. Yes.

13 MR. GREEN: Nothing further.

14 THE COURT: Any further cross-examination?

15 MR. SANDERS: Yes, Your Honor.

16 THE COURT: Mr. Sanders.

17 CROSS-EXAMINATION

18 BY MR. SANDERS:

19 Q. Mr. Fite, do you recall testifying about this last week?
20 This is Plaintiff's Demonstrative 74.

21 A. Yes. May I have the original put back up -- my eyesight
22 -- that's not a real clear slide. I hope that I'm not the only
23 one that sees it that way, but it's not real clear.

24 Q. Can you see it from this angle?

25 A. Yes.

1 Q. You may need to step down. One of the questions I want to
2 ask you relates to Ballard Creek. It's on the right-hand side
3 at the bottom. Can you tell me what date is shown on that
4 photograph.

5 A. Shows 04-04-2007.

6 Q. April 4, 2007; is that correct?

7 A. 04-04-2007.

8 Q. And in your testimony last week, I believe with regard to
9 that photograph of Ballard Creek, you said that that creek was
10 influenced, your words, by the Ozark Egg Company; is that
11 correct?

12 A. In the past, yes.

13 Q. And Ozark Egg Company is not a defendant in this case, is
14 it?

15 A. I don't believe so.

16 MR. SANDERS: That's all I have. Thank you,
17 Your Honor.

18 THE COURT: Any further cross? Mr. Garren. I'm
19 sorry.

20 MR. WEEKS: I do have. I was waiting for Cargill. I
21 do have, Your Honor.

22 THE COURT: All right. And, Mr. Sanders, for my
23 notes, is that Ballard Creek?

24 MR. SANDERS: I think it's B-A-L-L-A-R-D.

25 THE COURT: Thank you, sir.

CROSS-EXAMINATION

BY MR. WEEKS:

Q. You almost got away, Mr. Fite.

A. I knew I'd be back.

Q. My name is Gary Weeks.

A. Good afternoon.

Q. I represent George's. And we met briefly on Thursday, I believe, for the first time, correct?

A. Yes, sir.

Q. Okay. And I'll bet you know what I'm going to ask you about, don't you?

A. I hope you're going to ask me about my friend Gary.

Q. Yeah. We're going to go back, and I'm going to ask you a little bit about the incident that you described for Mr. Garren that involved the application of some liquid manure on the Wilmoth property. You remember that, don't you?

A. Yes, Dean Wilmoth.

Q. Dean Wilmoth?

A. W-I-L-M-O-T-H.

Q. And as I understand your previous testimony, Mr. Fite, that incident occurred back in the late '80s, around 1988; is that your recollection?

A. You're in the neighborhood. I don't know the exact date.

Q. I'm relying on your testimony, so --

A. That would be correct.

1 Q. All right. And the application of that poultry litter,
2 that was a self-contained truck, wasn't it, where it would
3 spray the liquid onto the ground?

4 A. Honey wagon truck.

5 Q. We have a picture, I believe, of one of the wagons. If we
6 could just put it up. And let me see, is that the kind of
7 vehicle there that you're talking about?

8 A. Yes, except that truck is red.

9 Q. Okay. But it's that type of vehicle that you're talking
10 about?

11 A. Yes.

12 Q. As you look at that picture, you can see the material that
13 is being spread from that coming from the rear, correct?

14 A. Yes, sir.

15 Q. Okay. Now, as a consequence of that particular incident,
16 I understand that you made a call to the appropriate agencies
17 to report it?

18 A. Yes.

19 Q. And in addition to that, as I understand it, you made a
20 call to Gary George?

21 A. I visited with Gary, yes.

22 Q. I assume that you called him and made arrangements to go
23 to Springdale and sit down and visit with him and discuss this
24 incident with him, correct?

25 A. Yes.

1 Q. And when you got there and you had this conversation with
2 Mr. George, how did you find him to respond to your concerns
3 here?

4 A. He was very sincere, very professional and open to the
5 discussion fully.

6 Q. And since 1988, have you ever had reason to call or
7 complain about the application of this liquid manure on the
8 Wilmoth property by a George's truck?

9 A. No.

10 Q. And, of course, that was the goal or the mission that you
11 hoped to accomplish when you went there, wasn't it?

12 A. Yes.

13 Q. Now, I want to move forward with you a few years to the
14 early '90s. And I think it was about that time that you said
15 Governor Clinton's animal task force was getting under way,
16 correct?

17 A. Yes.

18 Q. And as I understand it, it was at or about that time that
19 the State of Oklahoma was beginning to discuss, and its
20 legislature was in the process of passing some regulations as
21 it related to the application of poultry litter, correct?

22 A. The Arkansas task force, I believe, convened in 1990 and
23 consummated their work in 1993. And Oklahoma, in 1991, started
24 dealing with the commercial farming issues related to hogs and
25 poultry in 1991, I believe it was.

1 Q. And prior to that time, as I understand it, there were
2 really no Oklahoma laws or regulations that were regulating
3 that activity, was there, with regard to the land application
4 of poultry litter?

5 A. I believe you're correct.

6 Q. And so to the extent that growers were addressing that
7 issue or to the extent that the integrators were dealing with
8 that issue, it would have been on a voluntary basis, am I
9 right?

10 MR. GARREN: Assumes facts in evidence, Your Honor.
11 "Not in evidence" is what I meant to say.

12 THE COURT: If you know. Overruled.

13 THE WITNESS: Please repeat the question.

14 Q. (By Mr. Weeks) What we're talking about here is Best
15 Management Practices. You know about those, don't you?

16 A. Yes.

17 Q. You know that the government developed a set of Best
18 Management Practices in, let's say, the early '90s to address
19 the land application of poultry litter, correct?

20 A. Yes.

21 Q. Okay. And what I was saying is that to the extent that
22 there were no laws on the books, that these issues about the
23 land application of poultry litter were being addressed on a
24 voluntary basis by the Best Management Practices, am I right?

25 A. Yes. And SCS and then NRCS guidelines like Waste

1 Utilization 630.

2 Q. Correct. And I take it that you would approve of a
3 integrator, a poultry company, who was providing copies of
4 those Best Management Practices to its growers, would you not?

5 MR. GARREN: Objection, Your Honor. I don't think
6 it's relevant what Mr. Fite would approve to in regards to
7 poultry operations on a voluntary basis.

8 THE COURT: Sustained.

9 Q. (By Mr. Weeks) Were you aware, Mr. Fite, in the early
10 '90s, that poultry growers were being provided with copies of
11 these Best Management Practices by the poultry companies?

12 A. Copies of BMPs or copies of farm plans?

13 Q. Yes, the Best Management Practices, just the list of
14 practices that had been -- that had been created by the
15 government for purposes of managing the land application of
16 poultry litter.

17 A. The first recollection I have of BMPs being suggested for
18 the management of poultry waste came at, best of my ability to
19 draw out a date, late '80s, early '90s when Dr. Mike Smolen
20 appeared in Colcord, Oklahoma, and was almost run out of town
21 for suggesting BMPs to a roomful of poultry growers.

22 Q. And if George's attached a copy of those Best Management
23 Practices as an addendum to its contract and provided that to
24 the growers, then you wouldn't have been aware of that?

25 A. Yes, that's correct.

1 Q. That's correct that you weren't aware of it?

2 A. I had not seen a contract at that point.

3 Q. And you've never heard of what has been referred to in the
4 course of this case as George's Addendum D? D as in "dog."

5 A. I have not, no.

6 MR. WEEKS: Do we have a copy of that? There it is.

7 Q. (By Mr. Weeks) Is that something you've seen before,
8 Mr. Fite?

9 MR. GARREN: He's already indicated, Judge, he wasn't
10 familiar with it, so --

11 THE WITNESS: No, I have not.

12 Q. (By Mr. Weeks) Good enough. Are you familiar with any of
13 those Best Management Practices that were -- that were
14 enunciated by the government at that time?

15 A. Several, yes.

16 Q. Okay. Let me just ask you to review that document and see
17 if it appears that some of those practices there that are on
18 that document is -- are some that you were familiar with.

19 A. The first one for certain, as it controls runoff, but it
20 also controls loss of nitrogen to volatilization to the
21 atmosphere. Five tons is a little much. The third one is very
22 reasonable and expected. I believe number four should be
23 modified; 15 percent slope is pretty steep. Wouldn't modify
24 number 5. Definitely number 6, you should maintain records so
25 you can demonstrate what you did with your waste. Definitely

1 should be covered and tarped.

2 Q. Very good. Do you know who developed those practices,
3 sir? Do you know which government agency?

4 A. I do not.

5 Q. Did you know at that time, in the early '90s, if there
6 were management plans available from the government at all, if
7 a farmer could request a management plan at all?

8 A. Yes, but they weren't available to the public or to my
9 agency to review.

10 MR. WEEKS: Let's just pull up the very top portion
11 of that. First paragraph there, the first -- there you go.

12 Q. (By Mr. Weeks) And let me ask you if you were aware at
13 that time that George's had recommended that each of its farms
14 have a waste management plan. Is that something that you would
15 have been aware of?

16 MR. GARREN: Asked and answered, Your Honor.

17 MR. WEEKS: I don't believe I asked it about that,
18 Your Honor.

19 THE COURT: Overruled. Go ahead.

20 THE WITNESS: No.

21 Q. (By Mr. Weeks) Would that have been a good thing for an
22 integrator to ask its grower to do?

23 A. Yes.

24 Q. And would it have been a good thing -- or was it a good
25 thing that George's, as early as the 1990s, was providing this

1 information to its growers?

2 A. If you were, yes.

3 Q. Very good. Now, I want to take you up a few more years.

4 As I understood your testimony, you served on Governor

5 Keating's animal waste task force, right?

6 A. Yes.

7 Q. That was in 1997?

8 A. Yes.

9 Q. As a consequence of that task force, there were certain --
10 there were certain laws passed in the state of Oklahoma?

11 A. Yes.

12 Q. What were those?

13 A. One dealt with the hogs in western Oklahoma, in
14 Holdenville, Oklahoma and southeast Oklahoma, south-central.
15 And the other related to poultry.

16 Q. What year were those passed?

17 A. 1998.

18 Q. And they went into effect that year, correct?

19 A. Yes.

20 Q. And as I understood your testimony, it was after the
21 passage of that Act and the promulgation by the Arkansas
22 Department of Agriculture of those regulations that you had
23 conversations with various representatives about what you
24 thought was a good idea to begin to transport poultry litter
25 out of the Illinois River Watershed?

1 A. Yes.

2 Q. And you specifically testified that you had a meeting and
3 a conversation with your friend Gary George again in his
4 office?

5 A. And Otto Jech.

6 Q. Otto Jech. Otto is still there. I told you that the
7 other day, didn't I?

8 A. O-T-T-O, J-E-C-H.

9 Q. Tell me, when you went to have a conversation with Gary
10 George in 2002 about that, what was it that you hoped to
11 accomplish with him in that conversation?

12 A. Management of poultry waste within the Illinois River
13 basin.

14 Q. And specifically, you talked about the transportation of
15 the litter out of the watershed, correct?

16 A. Yes.

17 Q. And ways, I assume -- other ways, whatever they may be, to
18 minimize the amount of litter that was available for
19 application in the watershed?

20 A. Yes.

21 Q. Is that fair?

22 A. Yes.

23 Q. Okay.

24 MR. WEEKS: Do we have the State's exhibit with
25 regard to the transportation of poultry litter out of the

1 watershed?

2 (Off-the-record discussion was had.)

3 Q. (By Mr. Weeks) Have you seen this document before,
4 Mr. Fite?

5 A. I don't know that I've seen this exact document, but I've
6 seen something similar.

7 Q. I don't represent to you that those numbers up there are
8 correct, because I have reason to believe that they aren't
9 correct.

10 A. You believe they are or aren't?

11 Q. That they aren't correct. But this is the State's
12 representations --

13 A. Are not.

14 Q. -- on this document with regard to poultry litter that has
15 been transported out of the watershed for those particular
16 years. You see that, don't you?

17 A. Yes, sir.

18 Q. And you see George's name in particular on there, don't
19 you?

20 A. Yes.

21 Q. Now, your conversation with Gary George occurred in 2002,
22 am I right?

23 A. 1998 through 2002, yes.

24 Q. Do you see in 2003 that George's began to take litter out
25 of the watershed?

1 A. To Pocahontas, Arkansas.

2 Q. Correct. You know they do, don't you?

3 A. To Pocahontas, Arkansas.

4 THE COURT: Mr. Weeks, just a housekeeping matter. Is
5 this previously admitted into evidence?

6 MR. WEEKS: I believe it was a demonstrative that the
7 State used in its opening.

8 MR. GARREN: I can't say that it was, Judge, and I
9 don't have a recollection of seeing that particular document.
10 The reason I'm confused is because there are other similar
11 tables to that that do go to a different entity. So...

12 MR. WEEKS: Well, do we know if this document is in
13 evidence?

14 MS. XIDIS: It is not in evidence.

15 MR. GARREN: I know this particular document hasn't
16 been offered, I do know that.

17 MR. WEEKS: Do you have an objection if we offer it
18 at this point? It's your document.

19 MR. GARREN: No.

20 MR. WEEKS: We'll offer it into evidence at this
21 point, Your Honor.

22 THE COURT: It will be the entire document.

23 MR. WEEKS: Whatever this one is right here.

24 THE COURT: I take it this is a portion of the
25 document, correct?

1 MR. WEEKS: It's Demonstrative 130, I'm told.

2 THE COURT: So just to be clear, are you moving the
3 admission of the entire document 1231?

4 MR. WEEKS: I would just move for the admission of
5 this demonstrative that was used by the State.

6 THE COURT: We're not going to admit demonstratives,
7 so I don't believe this is -- according to Ms. Xidis, this is
8 not a demonstrative exhibit, correct?

9 MR. WEEKS: We had it listed as 130.

10 (Off-the-record discussion was had.)

11 MR. WEEKS: That is it right there.

12 THE COURT: Is this a demonstrative exhibit?

13 MS. XIDIS: 1231 is an actual trial exhibit.

14 THE COURT: Any objection to 1231?

15 MR. GARREN: No, Your Honor.

16 THE COURT: Very well. Plaintiff's 1231 is admitted.

17 MR. WEEKS: Very good. Thank you.

18 Q. (By Mr. Weeks) So, I take it, then, Mr. Fite, that you're
19 familiar with the efforts of George's to transport litter out
20 of the watershed?

21 A. Yes.

22 Q. And according to the State's exhibit, that began in 2003,
23 correct?

24 A. Based on this chart, yes.

25 Q. And according to that chart, it continued through 2006,

1 correct?

2 A. Yes.

3 Q. And, to your knowledge, do you have reason to believe that
4 it continues to this day?

5 A. Yes.

6 Q. Very good. With regard to those quantities there, I mean,
7 it suggests that George's has taken out 50,000 tons during
8 those four years. I would suggest that perhaps that -- some of
9 those numbers are incorrect.

10 But you have reason to believe that -- do you have
11 any reason to believe that those numbers there are more or less
12 correct?

13 MR. GARREN: Objection, Your Honor, foundation.

14 THE COURT: Sustained.

15 MR. WEEKS: He says he knows about it, Your Honor.

16 THE COURT: Generally that he knew that George's
17 began in or about 2003.

18 MR. WEEKS: Okay.

19 THE COURT: Now you're starting to call into question
20 your own exhibit here.

21 MR. WEEKS: Well, I'm just sort of taking advantage
22 of it, I reckon.

23 Q. (By Mr. Weeks) Now, did you view the transportation of
24 poultry litter out of the watershed as a good thing?

25 A. Yes.

1 Q. Good. Now, you testified previously that you have been in
2 most places in this watershed, although it's a big one, and
3 that you had seen a lot of poultry houses here or a lot of
4 poultry houses there.

5 Have you seen any poultry houses that have been shut
6 down or closed or retired or that are no longer in use in the
7 watershed?

8 A. Yes.

9 Q. Were you aware that George's had undertaken a program to
10 retire houses in the watershed?

11 A. Are they replacing those houses?

12 Q. No, sir.

13 A. No to your answer, too.

14 Q. I guess my question -- go back, then. Were you aware that
15 George's had undertaken a program to retire older houses in the
16 watershed and not replace them?

17 A. No.

18 Q. Then you wouldn't know, then, would you, sir, that they
19 have actually retired 83 houses in the watershed, would you?

20 MR. GARREN: Objection, Your Honor. I think we have
21 the testimony from the wrong end of the room here. I object to
22 the form.

23 THE COURT: Sustained. He's already said he wasn't
24 aware.

25 Q. (By Mr. Weeks) Now, another thing that we heard from the

1 State during another exhibit that we saw from the State during
2 the opening was some newsletter from my client, George's. Do
3 you know Monty Henderson?

4 A. I do.

5 Q. Monty, as you know, is president of George's, correct?

6 A. If you say so.

7 Q. Okay. Okay. Okay. Were you aware or has any -- well,
8 let me just put it this way. If Mr. Henderson undertook to
9 write newsletters addressing concerns and issues with regard to
10 phosphorus in watersheds, would that be a good thing?

11 A. Yes.

12 Q. Would you commend that?

13 A. Yes, as proactive.

14 Q. Thank you. I understand that you -- during your
15 testimony, you said that you had had various reasons to call in
16 and make complaints to the Oklahoma agencies with regard to
17 things that you had observed in the watershed and in the river,
18 correct?

19 A. Yes.

20 Q. That was -- dead cattle in the river was one of the things
21 you mentioned?

22 A. Well, one of the issues about dead cattle in the river, if
23 the water is up high enough that would push cattle in the
24 river, just think of the tons and tons of waste that are being
25 washed in the river, too.

1 Q. I understand that, but that's not how you described it
2 previously. You just talked about seeing a dead cow in the
3 river and calling that in and complaining about it, correct?

4 A. Yes.

5 Q. Okay. And you talked about the lagoons or the dikes
6 breaching and some flooding that occurred, correct?

7 A. Yes.

8 Q. Okay. If, in fact, the application of biosolids or sludge
9 was occurring in the Illinois River Watershed, what Oklahoma
10 agency would approve or permit that?

11 A. The Oklahoma Department of Environmental Quality.

12 MR. WEEKS: Can we get the picture of that truck up
13 again.

14 Q. (By Mr. Weeks) This truck here that's spraying, were you
15 aware that that's actually sludge coming out the back of it and
16 not manure?

17 A. I --

18 MR. GARREN: Objection, Your Honor, as to what truck
19 he's referring to. The truck that's applying it at this
20 time -- there's been no foundation or the truck they identified
21 that drained into the river.

22 THE COURT: Sustained.

23 Q. (By Mr. Weeks) You identified this truck previously as the
24 kind of truck that you observed putting liquid manure in the
25 river, correct?

1 A. I made reference that the truck is red, and George's are
2 white.

3 Q. Correct. But you said it was this kind of truck, right?

4 A. Similar.

5 Q. Well, are you aware that the stuff coming out of the back
6 of this truck is actually -- is actually sludge?

7 MR. GARREN: Objection, Your Honor, there's been no
8 foundation for him to know that.

9 THE COURT: Absolutely sustained. We need to stop
10 this kind of -- we have great lawyers here. This needs to
11 stop.

12 Q. (By Mr. Weeks) This is the kind of activity, though,
13 however, Mr. Fite, that you attempted to stop, isn't it?

14 A. Yes.

15 Q. Unsuccessfully, correct?

16 A. No. George's stopped.

17 Q. George's stopped. But the State didn't, did it?

18 A. I don't know.

19 MR. GARREN: Objection, Your Honor. State didn't
20 stop what? I'm confused.

21 THE COURT: Sustained. Rephrase.

22 Q. (By Mr. Weeks) Is the State continuing to put down sludge
23 in the Illinois River Watershed?

24 A. Biosolids from municipalities or industry?

25 Q. Yes.

1 A. Not that I'm aware of. I think most of the communities
2 have moved it outside of the basin.

3 Q. Okay. Other things that you've had reason to complain
4 about would have been the Westville Wastewater Treatment Plant,
5 wouldn't you, sir?

6 A. Yes.

7 Q. And as late as 2007, didn't you say that it was
8 discharging five times as much phosphorus into the basin as was
9 allowed by water quality standards?

10 MR. GARREN: Ask that he put it in perspective, Your
11 Honor, as to when and where the statement was made. If, in
12 fact, it was from some deposition or something, it's improper
13 impeachment.

14 Q. (By Mr. Weeks) Let's pull up the 2007 -- I apologize.

15 Were you aware, sir, that as late as 2007, ODEQ was
16 reporting that? I'm sorry.

17 A. I've had a long history with the City of Westville. We
18 just wrapped up last year building a brand-new SBR, or
19 Sequential Batch Reaction wastewater treatment facility there
20 to replace an antiquated system to meet a one part per million
21 phosphorous standard.

22 Q. But in '07, it wasn't, was it?

23 A. The new plant was not operational in 2007. It was not.

24 Q. Was it operational in 2008?

25 A. Yes.

1 Q. Okay. When in 2008?

2 A. Sometime late spring, midsummer, 2008.

3 Q. So for all those years prior to late spring or early
4 summer 2008, it was pouring that phosphorus out into the
5 Illinois River, wasn't it, sir?

6 A. They had an antiquated lagoon system, three-cell system,
7 and it was not operating properly. You are correct.

8 Q. I want to ask you about the water you passed out there at
9 the Oklahoma Scenic Rivers Commission headquarters. I got the
10 impression from the questions Mr. Garren asked you that somehow
11 -- you passed that water out because of the land application of
12 poultry litter; is that right?

13 A. Bacteria in the water column within our well.

14 MR. WEEKS: Can we pull up the Oklahoma Scenic Rivers
15 Commission minutes from 2/19/02. I believe that's page 4.

16 MR. GARREN: Do you have a copy of that?

17 MR. WEEKS: I do.

18 Q. (By Mr. Weeks) Can you read that one, or do you need a
19 hard copy, Mr. Fite?

20 A. May I borrow yours?

21 Q. You sure can.

22 A. Thank you.

23 MR. GARREN: Do we have a Bates number on this,
24 Mr. Weeks?

25 MR. WEEKS: There is no Bates number on this.

1 MR. GARREN: Is this an exhibit listed on the
2 exhibit -- on your list --

3 MR. WEEKS: This is cross-examination.

4 THE COURT: Then take it off.

5 Q. (By Mr. Weeks) Have you ever said, Mr. Fite, in contrast
6 to your testimony here today, that the current well at the
7 Oklahoma Scenic Rivers Commission headquarters does not meet
8 minimum Oklahoma Health Department regulations because it is
9 located too close to the septic system?

10 MR. GARREN: We object, Your Honor. He's now
11 backdooring the exhibit that he didn't mark and provide for
12 purposes of evidence with a statement from that same document.

13 MR. WEEKS: I can impeach him, Your Honor, from
14 anything. He can say yes or no.

15 THE COURT: I believe it's proper impeachment.
16 Overruled. Go ahead.

17 THE WITNESS: Yes.

18 Q. (By Mr. Weeks) Now, the fact that the headquarters is
19 located too close to your septic system, that has nothing to do
20 with the land application and of poultry litter, does it,
21 Mr. Fite?

22 A. Had to do with the standard that had been updated by the
23 ODEQ.

24 Q. Now, you talked about the warnings that the Oklahoma
25 Scenic Rivers Commission had issued, was it last summer?

1 A. (Witness nods head.)

2 Q. That was because of what you said -- let's see, how did
3 you -- body contact --

4 A. Primary body contact for recreation.

5 Q. Correct. Correct. And that was the subject -- has that
6 been the subject of some of your discussions there at the
7 Oklahoma Scenic Rivers Commission meetings?

8 A. Yes.

9 Q. And in the course of those meetings, did you learn that 82
10 percent of the streams tested statewide did not meet the
11 primary use for the primary body contact recreation?

12 MR. GARREN: Object, Your Honor. There's no
13 relevance to that, and we're outside the Illinois River
14 Watershed, which is the subject of this suit.

15 THE COURT: Sustained.

16 Q. (By Mr. Weeks) Now, did Mr. Smithee ever appear before the
17 Oklahoma Scenic Rivers Commission to talk about this issue?

18 A. Talked about phosphorus.

19 Q. He never talked to you about these warnings that you guys
20 were going to put out there?

21 A. I don't recall Mr. Smithee talking about it. He may have
22 been in attendance when we talked about it.

23 Q. So you don't remember a comment from him that more people
24 get sick from community swimming pools than from Oklahoma
25 streams and lakes?

1 A. That sounds like something John Craig would say.

2 Q. Your notes attribute it to Mr. Smithee, so I won't argue
3 with that.

4 MR. GARREN: Objection, Your Honor, those notes
5 aren't in evidence nor have they been offered nor presented to
6 this witness.

7 THE COURT: Sustained. That's improper.

8 Q. (By Mr. Weeks) Now, do you have a commissioner on there in
9 '08 named Randall, Mr. Randall, Commissioner Randall?

10 A. Yes, sir, he's an elected commissioner, one of 12 that
11 represents the Delaware County.

12 Q. Okay. He wasn't much in favor of that poster, was he?

13 A. Nor were the commercial flotation device operators.

14 Q. Yeah, I bet. But Mr. Randall was at least fair about it.
15 He just said it ought to apply all across the state, not just
16 to the Illinois River, correct?

17 A. That's correct. But, unfortunately, our jurisdiction is
18 only for those three counties and three rivers.

19 Q. I understand. Your hands are tied. That's all I have.
20 Thank you.

21 A. Thank you.

22 THE COURT: Mr. Tucker.

23 MR. TUCKER: Your Honor, it's been brought to my
24 attention that it's a good thing I didn't come from a large
25 family, because I seem to be confused about birth order in this

1 lawsuit. I actually follow Tyson and precede these other
2 folks, so I apologize to the Court. I'll try to get it
3 straight.

4 THE COURT: I was trying to figure out why you're
5 always at the tail end, Mr. Tucker.

6 MR. TUCKER: It just seemed like the place to be, but
7 it was pointed out to me that I got confused because Mr. Elrod
8 started it. Anyway, I just got confused. As I say, it's a
9 good thing I didn't come from a large family. I would have
10 gotten lost in the shuffle and probably would have starved to
11 death.

12 CROSS-EXAMINATION

13 BY MR. TUCKER:

14 Q. Would you agree, Mr. Fite -- and good afternoon, sir, by
15 the way. I'm John Tucker. You and I have met before?

16 A. Yes, sir. Good afternoon.

17 Q. I'm one of the many names that you've met once or twice
18 that you still remember six months or a year later, and I
19 appreciate that.

20 A. You left an inevitable impression upon me from our first
21 meeting.

22 Q. Well, are we thinking in terms of, like, seeing the Taj
23 Mahal for the first time or more like a bad meal?

24 A. Unfortunately, I've only been out of the United States
25 once, and that was to Canada.

1 Q. Well, let me just ask you, you've been dealing with that
2 river for an awfully long time and been in and around, on and
3 working with the Scenic Rivers Commission for an awfully long
4 time. Would you agree with me, Mr. Fite, that there are an
5 awful lot of competing interests that have an interest in that
6 river and in Lake Tenkiller?

7 A. Oh, yes.

8 Q. Just listening to the testimony today, listening to the
9 lawyers asking questions and also Mr. Garren asking you
10 questions the other day, we've obviously got the
11 environmentalists. We know about that. We've got -- the
12 ranchers have a big interest in what's going on in that river
13 because they water their cows from it, right?

14 A. Some do.

15 Q. And the tributaries that go to the river and the streams
16 and so forth?

17 A. Yes.

18 Q. Some of those guys have stock ponds, as -- or are
19 encouraged by the government to put in stock ponds as a
20 conservation measure, and they're using the water, right?

21 A. Yes.

22 Q. Then you've got the canoe operators and the
23 concessionaires who are using the water?

24 A. Yes.

25 Q. They've got a set of interests that have to do with how

1 the water is managed and how it's used, right?

2 A. Yes.

3 Q. Then you've got people that want to do developments along
4 the river, like Flint Ridge and some of those other places?

5 A. Yes.

6 Q. Every time you put in a development, that's kind of like
7 urban runoff; you change the character of what's happening to
8 the stream a little bit, don't you?

9 A. Yes.

10 Q. On the other hand, it would be a whole lot better if it
11 was all still woods like it is over there in the park in
12 Arkansas where nobody lives. We can just go back and see what
13 it looked like back before statehood?

14 A. Or the Nickel Preserve at the Nature Conservancy.

15 Q. Which is pretty close to the way it was. But we have all
16 those competing interests in the watershed, and one of the
17 things that you try to do at the Scenic Rivers Commission is to
18 try to find a way to balance all those competing interests,
19 isn't it?

20 A. Yes.

21 MR. GARREN: Object to the form, Your Honor. It's
22 not what the "charge admission" testimony was previously. It
23 was to preserve and protect.

24 THE COURT: He'd already begun answering.

25 Overruled. Go ahead.

1 Q. (By Mr. Tucker) Is that right, Mr. Fite?

2 A. I said yes. Yes. Sorry.

3 Q. The -- it's clear to say that both the river and the lake
4 would be described as multiuse waterways, wouldn't it?

5 A. Yes.

6 Q. You would encourage such things -- some of the things you
7 see that have to do with the use of the river, the -- there's
8 no regulation against it, but the Commission would prefer that
9 it not be done, like overgrazing, for example. You prefer that
10 not be done?

11 A. Wish that, but, unfortunately, I only have control of
12 about 50 percent of the basin. It's outside of my
13 jurisdiction.

14 Q. You really can't prevent overgrazing in your part of the
15 basin, can you?

16 A. No but we're bringing tools to bare to hopefully mitigate
17 some of that.

18 Q. That's the voluntary crep program?

19 A. Yes.

20 Q. That's to encourage ranchers to do a better job of
21 managing their pastures and a better job of building in buffer
22 strips and things like that?

23 A. Yes.

24 Q. Of course, you prefer that ranchers not let cattle graze
25 right on down to the banks of the stream?

1 A. Yes, that's correct.

2 Q. It would be better if, since -- stream bank erosion is a
3 huge problem with the watershed, isn't it?

4 A. Yes.

5 MR. GARREN: Object to the form "huge," Your Honor.

6 THE COURT: Overruled.

7 Q. (By Mr. Tucker) Well, it's a big problem. Is that
8 better? A big problem?

9 A. Erosion, sedimentation has associated with it nutrients,
10 particularly phosphorus attaches itself. So when there's
11 erosion, you have a direct conveyance in addition to runoff
12 into the river.

13 Q. You would prefer, for example, that livestock not
14 contribute to that stream bank erosion?

15 A. Yes.

16 Q. But to stop it is not within your jurisdiction. All you
17 can do is encourage people to take measures so that it doesn't
18 happen?

19 A. You're correct.

20 Q. Now, the end result that you're talking about, of course,
21 when you have stream bank erosion, as I understand it, it also
22 changes the nature of the river, it makes it wider, puts in
23 more gravel banks, takes away some of the deeper pools. Is
24 that right?

25 A. Yes.

1 Q. And that's not a good thing to keep a river young, because
2 a river starts to age immediately when it's born, doesn't it?

3 A. It accelerates sedimentation and streambank accretion.

4 Q. I'm probably the only person that ever enjoyed my geology
5 field trip to the Arbuckle Mountains because I got to see my
6 first explanation of an oxbow lake. It stuck with me ever
7 since. One of these days, probably none of us will still be
8 here, but one of these days, the Illinois River is going to
9 have a whole lot of oxbow lakes, isn't it? Probably long past
10 our lives. But in the future, the Illinois River, just like
11 any other river, will ultimately become an aging river and it
12 will have meanders and become a river that has oxbow lakes?

13 A. It already has oxbows.

14 Q. I guess it's older than I thought. But all these
15 things -- one of the things you're concerned about as an
16 immediate concern right now is that a lot of these things cause
17 nutrients, such as phosphorus, to get in the waterway. And
18 those nutrients can come from cows, it can come from something
19 that's on the surface of the pasture, it could come from
20 natural phosphorus that's naturally occurring in the soil,
21 couldn't it?

22 A. Some of it could, yes.

23 Q. Sure. And some other sources have been mentioned, too,
24 but I don't want to go back over that. But my point is this --

25 A. You left out poultry waste.

1 Q. Pardon?

2 A. You left out poultry waste.

3 Q. I thought I said the soil that was in -- the phosphorus
4 that was on the soil in the pastures. I'm assuming that's what
5 you were talking about.

6 A. You mentioned cows.

7 Q. I was thinking more of a direct deposit by the cows on the
8 pasture, that 60 pounds a day you talked about.

9 A. The cows are eating the grass that the poultry waste grew,
10 passing through the cow, putting it back on the ground.

11 Q. Wasn't that grass also grown from commercial fertilizer?

12 A. Some was, yes.

13 Q. I mean, grass contains phosphorus, doesn't it?

14 A. Some.

15 Q. Well, does the fact --

16 A. Grass is not a real good user of phosphorus.

17 Q. Does the fact that you fertilize grass, if you have a bale
18 of alfalfa --

19 A. That's different than grass. Alfalfa is different.

20 Q. A bale of Fescue, a bale of Fescue that has been grown in
21 a pasture, does it make a difference how much phosphorus is in
22 that grass, whether or not that field has been fertilized?

23 A. Most of your grass is going to uptake nitrogen.

24 Q. Can you answer my question? Does it make a difference how
25 much a pasture has been fertilized as to the amount of

1 phosphorus that a plant uptakes?

2 A. No.

3 Q. So grass is grass when a cow eats it, isn't it? Cow
4 doesn't care where the grass comes from?

5 A. That's true.

6 Q. Grass is going to contain phosphorus, whether it comes
7 from the Illinois River Watershed or Waxahatchee?

8 A. I don't know if there's any poultry farms down there.

9 Q. Is there any grass down there?

10 A. Some.

11 Q. You can buy hay places other than the Illinois River,
12 right?

13 A. True.

14 Q. Hay is always going to contain phosphorus, right?

15 A. Probably so.

16 Q. When the cow eats the hay, wherever it comes from, the
17 cow's poop is going to contain phosphorus?

18 A. Poop?

19 Q. What would you prefer I call it? We've been asked to stay
20 away from the phrase "cow patty" for the duration of the case.

21 A. I actually call them meadow muffins.

22 Q. What?

23 A. Meadow muffins.

24 Q. Meadow muffins? I think I'll just stick with "poop," if
25 you don't mind.

1 Let me get back to the point I'm trying to make
2 here. There are a lot of different places that phosphorus can
3 get into the water, but what you're concerned about the
4 phosphorus, as you've told us, is that when you fly over it,
5 you see different colors in the winter than in the summer. You
6 see kind of a green cast, which indicates that there's algal
7 growth taking place in the river and taking place in the lake,
8 right?

9 A. Yes.

10 Q. And the algal growth, of course, is stimulated by
11 photosynthesis?

12 A. Yes.

13 Q. Warm water in the summer compared to the winter?

14 A. An abundance of nutrients, direct sunlight.

15 Q. A recreational user, like a canoer or, say, a scuba diver
16 in the lake, his goal is going to be to have the water as clear
17 as he can have it, isn't he?

18 A. Yes.

19 Q. And so for water clarity, what you want to do is you want
20 to get as few nutrients as possible to minimize the algal
21 growth as much as you can; is that right?

22 A. Yes.

23 Q. Would you agree also, on the other hand, that you have a
24 fisheries manager or a fisherman, they desire more algal growth
25 to support a larger warm-water fishery?

1 A. To a point.

2 Q. To a point.

3 A. When you go past the saturation point, then your fishery
4 declines.

5 Q. In other words, my point is, sir -- and I'm not going to
6 go through the fishing statistics with you because, believe it
7 or not, we have fish experts coming in to testify about how
8 many fish there are, among the dozens of experts lined up for
9 somebody to tell us about fish.

10 But my point is, is that what you just said is an
11 example of how we're always trying to balance the interest in
12 the use of the waterway, aren't we, between the fisheries group
13 that wants some algal growth and the recreational group that
14 wants none; would you agree with that?

15 A. I'm trying to balance what's best for the river.

16 Q. Would you agree with what I just said?

17 A. Those other groups, yes.

18 Q. Thank you.

19 THE COURT: Mr. Fite, your discussion about alfalfa
20 raised the issue, because it had been discussed in the past
21 that a possible way to uptake some of this phosphorus is to
22 plant alfalfa. Has that been tried at all by the Scenic Rivers
23 Commission?

24 THE WITNESS: We have not tried that to date.

25 THE COURT: Do you know any agencies or organizations

1 that have tried that?

2 THE WITNESS: The crux of the problem in the Illinois
3 River basin on the Oklahoma side is that the soils are
4 marginal, at best. And so it's hard to grow crop. And that's
5 the reason that we don't have the row cropping on the Illinois
6 River, like you would see in the Arkansas river bottom.

7 THE COURT: Without plowing, is there a method by
8 which one could do no-till farming, seed-drill the alfalfa in?
9 At a point, it comes uneconomical, I'm sure. But you're aware
10 of no programs to try to do that?

11 THE WITNESS: I'm not familiar if any programs that
12 have done that to date. There's been some limited growing of
13 squash, hay grazer, corn and so forth in some of the bottom
14 areas right adjacent to the Illinois River. One of the areas
15 that comes to mind is the Buck Ford area where there has been
16 some corn introduced in the past and grown.

17 We had a -- actually had a commercial flotation
18 device operator who attempted to grow a crop this year to make
19 ethanol out of it, the Combs Bridge area, and that did not work
20 for him. He spent about \$15,000 putting the crop in, and was
21 not able to utilize that particular crop.

22 There are some areas I know on the Arkansas side
23 where there is some row cropping going on, and there is some
24 alfalfa. So I don't want to mislead you that there's not
25 alfalfa in the basin.

1 THE COURT: But that's a plow situation?

2 THE WITNESS: Most generally.

3 Q. (By Mr. Tucker) With alfalfa, is it also a problem that
4 you have to have a particular depth of soil because of the
5 extremely deep-rooted nature of the way alfalfa grows?

6 A. Yes.

7 Q. Thank you, sir.

8 CROSS-EXAMINATION

9 BY MS. LONGWELL:

10 Q. How are you today?

11 A. Fine. And you?

12 Q. Good. I think I might be the last at our table for right
13 now for you. My name is Nicole Longwell. We've met before,
14 haven't we?

15 A. Hi, Nicole.

16 Q. I want to follow up on a couple of topics, maybe just get
17 a little more detail from you on a couple of topics that have
18 been hit on today. One of those is the restroom facilities
19 along the Illinois River. Now, you've been an administrator at
20 the Oklahoma Scenic Rivers Commission since 1983, correct?

21 A. Yes.

22 Q. And at the time you came to the Oklahoma Scenic Rivers
23 Commission, there were only a couple of restroom facilities
24 along the river for the recreators; is that correct?

25 A. Yes.

1 Q. And you had some concerns about the ability of those
2 facilities to handle all the human wasteload from the
3 recreators, didn't you?

4 A. Yes.

5 Q. And, in fact, the individuals weren't even taking
6 advantage of those particular restroom facilities, were they?

7 A. They were pretty poor facilities.

8 Q. So is it fair to say that one of your missions when you
9 came into office was to upgrade the restroom facilities along
10 the river?

11 A. Yes.

12 Q. In fact, without those facilities, many recreators
13 relieved themselves within the waters and also on the stream
14 banks of the river, correct?

15 A. Yes.

16 MR. GARREN: Objection, form. No foundation.

17 THE COURT: Overruled.

18 Q. (By Ms. Longwell) Is it fair to say that approximately
19 400,000 or more people actually recreate in the Illinois River
20 area annually?

21 A. Yes.

22 Q. And with regards to the people who actually recreate on
23 the river, those individuals spend a significant portion of
24 their day on the river, correct?

25 A. Those individuals that are floating.

1 Q. I'm sorry, thank you for the correction. That's exactly
2 what I meant. The people who are floating the river spend a
3 significant portion of the day on the river?

4 A. Yes. Not all the 400,000 are floating.

5 Q. Right. In 1991, you sought funds from the Oklahoma
6 Conservation Commission to build 10 new restroom facilities at
7 different public access points along the river, didn't you?

8 A. Yes.

9 Q. And did you obtain the funds for those 10 facilities?

10 A. I believe to date, we have built 12.

11 Q. Twelve permanent facilities?

12 A. Let me stop and do some math in my head for a moment.
13 Since John has got the calculator, I'll have to do it in my
14 head. Twelve.

15 Q. At the time, in 1991, was it -- were you seeking funds for
16 10 new public restroom facilities?

17 A. Yes.

18 Q. And four of those facilities were going to replace the
19 inadequate facilities that previously existed, correct?

20 A. Yes.

21 Q. And, in fact, those facilities opened sometime in and
22 around May of 1994; is that correct?

23 A. We have some facilities that go back to 1988 coming
24 forward through 1994, new facilities. Actually, we have two
25 facilities that are since 1994.

1 Q. Okay. So let me go back. Let's -- just so we can be
2 clear on the chronology of this. Prior to seeking funds in
3 1991 from the Oklahoma Conservation Commission, there were four
4 facilities in the Illinois River Watershed for those who were
5 recreating the water; is that correct?

6 A. Yes.

7 Q. And those four facilities were inadequate to address the
8 amount of humans that were partaking on the river, correct?

9 A. Yes.

10 Q. And in 1991, you sought funds for 10 new facilities?

11 A. Yes.

12 Q. Those facilities were put in place by 1994; is that
13 correct?

14 A. I believe you're correct.

15 Q. Okay. And within the first year, is it fair to say that
16 approximately 12,000 gallons of human waste were pumped out of
17 those 10 new facilities?

18 A. Yes.

19 Q. Let me go back. Four -- four of those facilities that
20 were part of the 10 new facilities for 1991 replaced the four
21 existing facilities prior to that date, correct?

22 A. No.

23 Q. Were the four that were inadequate still in place in 1994?

24 A. We replaced two at Peavine public access area,
25 P-E-A-V-I-N-E, and two at Round Hollow previous to that. Those

1 would have been constructed in 1988, approximately.

2 Q. So let me go back to talking about the facilities. These
3 facilities were built away from the actual floodplain of the
4 river, correct?

5 A. They are in the floodplain. They're not in the floodway.

6 Q. So were you having -- were you seeing -- strike that.

7 Is it fair to say that even though the Oklahoma
8 Scenic Rivers Commission had built these 10 new facilities as
9 of 1994, you were noticing that there were still people who
10 weren't utilizing those facilities because of their location to
11 the river?

12 A. Yes.

13 Q. So at that point in time, did you address the Oklahoma
14 Scenic -- I mean the Oklahoma Conservation Commission again for
15 funds to provide additional bathroom facilities along the
16 river?

17 A. Yes, portable bathrooms.

18 Q. So you decided that those 10 permanent facilities that had
19 been built, along with any existing facilities that were in
20 place prior to 1994, were inadequate to meet the -- still were
21 inadequate to meet the visitors annually along the river?

22 A. Yes.

23 Q. And in 1995, you sought funds to place 10 porta-potties
24 along the river; is that correct?

25 A. Sometime in that time span, yes, ma'am.

1 Q. Then the funding, however, for those 10 facilities were
2 not provided until approximately 1998?

3 A. I don't have that knowledge in my head, but you're
4 probably in the ball park as far as dates.

5 Q. And, in fact, at some point, you decided to increase the
6 number of porta-potties from 10 to 17 because you didn't feel
7 10 was adequate; is that correct?

8 A. That's correct.

9 Q. So from 1998 to 2001, there were approximately 27 restroom
10 facilities available to the recreators on the Illinois River;
11 is that correct?

12 A. Provided by the Scenic Rivers Commission. That does not
13 include the commercial flotation device operations'
14 facilities.

15 Q. That were available to their customers?

16 A. Uh-huh.

17 Q. But these were on various locations along the river,
18 correct?

19 A. Yes, ma'am.

20 Q. So at the time you came to the Oklahoma Scenic Rivers
21 Commission in 1983, and by 2001, you had made it your mission
22 to get these 27 facilities in place; is that correct?

23 A. Well, it was a team effort. My staff included.

24 Q. Was there a four-year period of time in the 19- -- from
25 about 2001 to 2004 where you didn't have sufficient funds to

1 provide some of these portable facilities?

2 A. Yes.

3 Q. Okay. So not all 27 restroom facilities were available
4 between 2001 and 2004, correct?

5 A. Yes.

6 Q. Is it fair to say -- let me hand you -- I'm going to hand
7 you a document I'm going to put into evidence. Defendants'
8 Exhibit 2542.

9 MS. LONGWELL: Your Honor, may I approach the
10 witness?

11 THE COURT: You may.

12 Q. (By Ms. Longwell) Mr. Fite, have you seen this document
13 before?

14 A. Yes.

15 Q. Are you familiar with the contents of the document?

16 A. Yes.

17 Q. And the title of the document is "Portable Toilet Use
18 Along Illinois River, October 25, 2004," correct?

19 A. Yes.

20 MS. LONGWELL: I'd move for the admission of
21 Exhibit 2542.

22 MR. GARREN: Relevance, Your Honor

23 MS. LONGWELL: It goes to the number of portable
24 toilets available on the river that we've been discussing.

25 THE COURT: Overruled. Defendants' Joint Exhibit

1 2542 is admitted.

2 Q. (By Ms. Longwell) Mr. Fite, what I'd like to do is address
3 -- have you turn to the second page of this exhibit. And
4 looking at the first full paragraph where it starts "17 units
5 replaced this year in the highest use locations during mid to
6 late May and removed in mid-September," these are the portable
7 units we were discussing, correct?

8 A. Yes, ma'am.

9 Q. I wanted to draw your attention to the last sentence in
10 this paragraph. It says, "This year, there were 3500 gallons
11 of waste per week removed from the 17 portable units." Do you
12 see that?

13 A. Yes.

14 Q. Did I read that correctly?

15 A. Yes.

16 Q. And then I'd like to draw your attention to the last
17 sentence of the last paragraph. Says, "However, the removal of
18 over 60,000 gallons of waste this year from the river can only
19 be seen as a positive outcome of these portable units on
20 site."

21 So these portable units have removed over 60,000
22 gallons of waste from the river on a yearly basis; is that
23 accurate?

24 MR. GARREN: Object. That's not what it says,
25 Your Honor.

1 THE COURT: Sustained. Rephrase.

2 Q. (By Ms. Longwell) Do you agree with this statement
3 contained in Exhibit 2542?

4 MR. GARREN: For the record, the statement is the
5 last sentence of this page; is that correct?

6 MS. LONGWELL: Yes.

7 THE COURT: Correct.

8 THE WITNESS: I want to say that includes the
9 permanent facilities as well.

10 Q. (By Ms. Longwell) Is it fair to say approximately 60,000
11 gallons of human waste containing fecal bacteria were removed
12 from the river during those years when all these restroom
13 facilities are available?

14 A. Yes.

15 Q. So can I reasonably draw from this that when there were
16 not restrooms available -- 27 restrooms available, that the
17 human sewage that were removed from these facilities was
18 actually deposited directly within the river or immediately
19 adjacent to it on the streambanks?

20 MR. GARREN: Objection, Your Honor, improper form.
21 Doesn't -- it excludes the idea that this is a current number
22 and that the prior numbers may have had less visitors to the
23 watershed. There might have been different uses available for
24 those who did use it at different times. Too many variables
25 here in that assumption.

1 THE COURT: Rephrase, please.

2 Q. (By Ms. Longwell) Prior to these restrooms being
3 available, is it fair to say that these 60,000 gallons of human
4 waste were directly deposited somewhere within the watershed
5 outside of these restrooms?

6 MR. GARREN: Your Honor, that could assume, then,
7 that they would have gone into town and used an appropriate
8 facility there, and that would have been properly treated, as
9 it's supposed to be. There's just too many assumptions there.
10 The form is bad.

11 THE COURT: Overruled. Go ahead.

12 THE WITNESS: If the river users did not use a
13 facility offered by one of the licensed commercial flotation
14 device operations that were required by rule to provide
15 bathrooms to their users, that is a possibility. Yes.

16 Q. (By Ms. Longwell) The number of users -- the number of
17 recreators along the Illinois River, from the time you took
18 office to the present date, has not changed that much, has it?

19 A. It has not.

20 Q. Is it true that a portion of the \$1.1 million that the
21 poultry companies gave to the Oklahoma Scenic Rivers Commission
22 was supposed to be earmarked for constructing new bathrooms?

23 A. Used for bathrooms.

24 Q. Used for bathrooms. Were some of those funds used for
25 those portable facilities that we talked about?

1 A. \$100,000 of the four-year contribution of \$1.1 million was
2 used for bathrooms for recreationists during that four-year
3 period.

4 Q. And the Oklahoma Scenic Rivers Commission does not have
5 the ability to remove those portable facilities during a high-
6 flow event; is that correct?

7 A. We work with a contractor to remove them.

8 Q. So you have to contact the contractor to get those 17
9 portable facilities out of the --

10 A. We have moved them as well.

11 Q. And even after all the efforts that the Oklahoma Scenic
12 Rivers Commission has undertaken, there is still recreators
13 along the Illinois River who don't take advantage of the
14 restroom facilities that have been provided, aren't there?

15 A. Yes.

16 Q. I just want to touch briefly on a couple of points with
17 regard to the Watts sewage lagoon. At one point in time, the
18 -- there was a proposal to connect West Siloam Springs to the
19 Watts sewage lagoon, correct?

20 A. Yes.

21 Q. And that was back in 1999? Is that approximately the
22 right date?

23 A. Somewhere in that time span, yes, ma'am.

24 Q. And you contested that?

25 A. The Oklahoma Scenic Rivers Commission did protest that

1 proposal.

2 Q. And would some of the waste that would have come from West
3 Siloam Springs have included waste from Natural Falls State
4 Park?

5 A. Yes.

6 Q. Is it fair to say that the Oklahoma Scenic Rivers
7 Commission had concerns that the lagoon system at Watts could
8 not handle the additional volume of waste from West Siloam
9 Springs?

10 A. Yes.

11 Q. Additionally, you expressed concerns about the lagoon
12 effluent concerning environmental harm?

13 A. Yes.

14 Q. And you had that concern outside of this proposition to
15 connect West Siloam Springs to Watts sewage lagoon, didn't you?

16 A. Yes.

17 Q. Let me see if I can ask you a couple of questions about
18 your concerns regarding the specific concerns you raised with
19 the ODEQ about the Watts sewage lagoon connection to
20 Westville. Let me direct your attention to Defendants' Joint
21 Exhibit 1400.

22 THE COURT: Ms. Longwell, you actually have slowed
23 down considerably from the last trial that we were in
24 together. But I'm getting notations from the court reporter,
25 who is absolutely one of our finest, that you have the capacity

1 of speaking so fast that you overload the court reporter. So,
2 I know it may be hard for her to believe, but you were much
3 faster the last time around. So if you could try to put some
4 more brakes on, please.

5 MS. LONGWELL: I apologize. It's the product of
6 being the middle child, Your Honor.

7 THE WITNESS: Middle or mental?

8 THE COURT: Middle.

9 THE WITNESS: I just wanted to make sure.

10 MS. LONGWELL: May I approach the witness?

11 THE COURT: You may.

12 As I recall, she whipped somebody in a jury trial who
13 had three times the experience. So she's not mentally
14 challenged.

15 MS. LONGWELL: Thank you, Your Honor. Appreciate
16 that.

17 Q. (By Ms. Longwell) Mr. Fite, just as some background
18 information, did you submit to the ODEQ your concerns about the
19 connection of the -- West Siloam Springs to the Watts sewage
20 lagoon?

21 MR. GARREN: Asked and answered.

22 THE COURT: Sustained.

23 Q. (By Ms. Longwell) Since you have -- let me ask you: This
24 letter that I provided you, Defendant's Joint Exhibit 1400,
25 have you seen this document before?

1 A. I would say yes, I have.

2 Q. In fact, on page 3 of that document, are you not listed as
3 one of the individuals receiving this document?

4 A. Yes.

5 MS. LONGWELL: I move for the admission of
6 Defendants' Joint Exhibit 1400.

7 THE COURT: Any objection?

8 MR. GARREN: Relevance, Your Honor. He's already --
9 he's already mentioned that he's made a comment. Cumulative.

10 MS. LONGWELL: Your Honor, this goes into the
11 specific concerns of Mr. Fite, which I have not asked yet.

12 THE COURT: Just one second. Do we actually have
13 Mr. Fite's concerns memorialized in this document?

14 MS. LONGWELL: Your Honor, if you'll look at page 10
15 of the document.

16 THE COURT: Overruled.

17 MR. GARREN: I would note, Your Honor, that these
18 aren't necessarily Mr. Fite's. If you'll notice on page 24 of
19 this exhibit, 104-24, these are actually comments from Thomas
20 Alexander of Enercon Services in 1998. I believe those are the
21 comments that are alluded there, just transmitted through
22 others.

23 THE COURT: All right. How about -- what about
24 that?

25 MS. LONGWELL: I can ask the witness.

1 Q. (By Ms. Longwell) Mr. Fite, did you relay certain concerns
2 on behalf of Mr. Alexander or on behalf of yourself to the
3 ODEQ -- or the Oklahoma Scenic Rivers Commission? I
4 apologize.

5 A. On behalf of the Oklahoma Scenic Rivers Commission.

6 MS. LONGWELL: I move for the admission of this
7 exhibit.

8 THE COURT: Did you actually present these comments
9 to ODEQ, Mr. Fite?

10 THE WITNESS: If I did, it would have been through
11 our liaison, Jeannine Hale, who worked for the Attorney
12 General's office at the time. At that point in time, Jeannine,
13 Your Honor, would convey most of our concerns to other agencies
14 on our behalf.

15 THE COURT: Any objection?

16 MR. GARREN: Just same, Your Honor, with regard to
17 relevance.

18 THE COURT: Well, I think in terms of relevance, the
19 objection is overruled. Defendants' Joint Exhibit 1400 is
20 admitted.

21 MS. LONGWELL: April, turn to page 10 of this
22 exhibit, please.

23 Q. (By Ms. Longwell) Mr. Fite, I know you are already there,
24 so let's discuss the comments that are held here on Exhibit
25 1400 at page 10. You just discussed with the judge that these

1 were comments of the Oklahoma Scenic Rivers Commission that
2 were provided through Jeannine Hale; is that correct?

3 A. Yes.

4 Q. Did the Oklahoma Scenic Rivers Commission commission the
5 services of Thomas Alexander to evaluate the Watts sewage
6 lagoon in this proposal?

7 A. No.

8 Q. Was there -- when you look at the -- let's go through the
9 questions that are posted here, and you tell me if this was a
10 concern of the Oklahoma Scenic Rivers Commission.

11 Looking at question 1, was one of your concerns that
12 the lagoons and the irrigation system located in the flood
13 plain of the -- was located in the floodplain of the Illinois
14 River?

15 A. Yes.

16 Q. Was one of the Oklahoma Scenic Rivers Commission's
17 concerns that the lagoon was inadequate to handle the volume of
18 the sewage flow?

19 A. Yes.

20 Q. Was one of the concerns of the Scenic Rivers Commission
21 that this filtration system at the Watts sewage lagoon -- there
22 was no -- excuse me, strike that. That there is no primary bar
23 screening or preliminary filtration of the raw sewage effluent
24 from Watts?

25 A. Yes. That means to take out materials that would come

1 through the wastewater conveyed in the pipe, things that you
2 wouldn't want to talk about.

3 Q. Those things made it into the actual lagoon because of the
4 filtration system?

5 A. Yes.

6 Q. Questions 5 and 6: Was one of your concerns that the
7 lagoon and irrigation system were apparently built over an area
8 where natural seeps and springs occur?

9 A. Yes.

10 Q. And that because the lagoons were built on top of these
11 natural seeps and springs, there's a direct communication
12 between the material contained in the lagoons and the
13 groundwater?

14 A. That was a potential, yes.

15 Q. Was one of the concerns of the Oklahoma Scenic Rivers
16 Commission that there were areas where the side berms of the
17 lagoons were leaking or seeping?

18 A. Yes.

19 THE COURT: Before we go through all of these, this
20 was in '98. Has this been addressed?

21 MS. LONGWELL: That's a follow-up question that I had
22 for Mr. Fite.

23 THE COURT: All right. Go ahead.

24 Q. (By Ms. Longwell) And wasn't one of the concerns of the
25 Oklahoma Scenic Rivers Commission that there was a low-lying

1 east-west swale that was located north of the irrigation arm's
2 central pivot point?

3 A. Yes.

4 Q. And that this swale could encourage the overland flow of
5 applied and pooled wastewater into adjacent properties to the
6 west and subsequently to the Illinois River?

7 A. Yes, from the irrigation site.

8 Q. Does that irrigation site still exist today for the Watts
9 sewage lagoon?

10 A. Yes.

11 Q. Has any changes been made, to your knowledge, with regards
12 to that irrigation site?

13 A. Yes.

14 Q. What changes have been made?

15 A. For the system or just for the irrigation site?

16 Q. The irrigation site.

17 A. They are very limited at the town of Watts when they
18 utilize the irrigation site.

19 Q. But it's still utilized?

20 A. Occasionally. Not like it was, not the frequency.

21 Q. Do you know when they began to cut back on utilizing that
22 irrigation?

23 A. After this period of time.

24 Q. So sometime in 2000?

25 A. '99, 2000, that time span.

1 Q. Prior to that point, there was no control with regards to
2 the land application of this sewage effluent; is that correct?

3 A. The irrigation system was supposed to be used only during
4 the growing seasons of the year for crop uptake for
5 promulgation of hay.

6 Q. And the growing seasons of the year are usually also the
7 most rainiest seasons of the year, are they not, Mr. Fite?

8 A. No.

9 Q. They're not?

10 A. No. June, July, August are generally pretty dry.

11 Q. Let's look at the next page.

12 A. Okay.

13 Q. Page 11 at the top. Was one of the concerns of the
14 Oklahoma Scenic Rivers Commission that when high-water
15 conditions are present, water in the river can actually back up
16 into the swale and inundate the land application area?

17 A. Yes.

18 Q. Does that potential still exist today?

19 A. Yes.

20 Q. Are you aware of any updating that has been undertaken by
21 Watts with regards to the lagoon system?

22 A. Yes. A new Crawford dam has been built that was
23 demonstrated earlier in the flyover of the lagoon system that
24 cut off of one of the seeps that were filling up the primary
25 lagoon cell number 1, spilling over to lagoon number 2 and

1 filling up the finishing lagoon, then causing the system to be
2 at capacity with no freeboard.

3 When that particular improvement was made, that
4 stopped some of the infiltration from groundwater seepage into
5 the system.

6 Q. When was that done?

7 A. It's been a number of years ago.

8 Q. In the early 2000s?

9 A. I'm not certain, but I remember it was done. There have
10 been new hydraulic gates installed in the facility that
11 regulate the hydraulic levels of all three. And there has been
12 considerable management of the irrigation site, better
13 management than there has ever been.

14 Q. Okay. And do you still have concerns, however, about the
15 Watts sewage lagoon's ability to manage any additional sewage
16 from any other source outside of --

17 A. Yes.

18 Q. That's for the same reason as you had an issue with the
19 Westville connection proposal?

20 A. Yes.

21 Q. I want to briefly talk to you just a moment about gravel
22 mining. Is it true that the Oklahoma Scenic Rivers Commission
23 adopted a rule which prohibited mining in the Illinois River?

24 A. Yes.

25 Q. However, as you discussed previously, there is still some

1 mining that's going on in the Barren Fork; is that correct?

2 A. Not within our jurisdiction.

3 Q. But it's still occurring with in the watershed?

4 A. Yes.

5 Q. Isn't it true that the State of Oklahoma permits the
6 removal of gravel out of the creek and riverbeds at Barren
7 Fork?

8 A. There is a very limited permit. I don't know what the
9 modifications have been since the court case, but Jock Worley
10 operation to the east of the Barren, Oklahoma area is still
11 located there, and he can remove a certain amount of gravel per
12 year on an annual basis.

13 Q. You would agree with me that removing gravel from the
14 creek and riverbeds can present turbidity issues, can it not?

15 A. Yes.

16 Q. Can release sediment into the system?

17 A. Yes, and it increases erosion upstream and downstream of
18 the burrow area.

19 Q. It was this concern that caused the Oklahoma Scenic Rivers
20 Commission to adopt the rule prohibiting mining in the Illinois
21 River; isn't that true?

22 A. Yes, April 20, 1993.

23 Q. Despite your best efforts, however, there have been people
24 who have been found to have built dams and dug up gravel out of
25 the creekbeds to create dams in the Illinois River Watershed;

1 isn't that true?

2 A. Yes. We brought action against those individuals within
3 our jurisdiction.

4 Q. With regards to Jock Worley's operations in the Barren
5 Fork, has the Oklahoma Scenic Rivers Commission expressed
6 concerns about those activities and the effect on the Illinois
7 River?

8 A. We have expressed our concerns primarily on its direct
9 impact on the scenic river Barren Fork Creek immediately
10 downstream about one mile from the burrow area that Mr. Worley
11 operates from.

12 Q. Does this type of activity also affect fish and fish
13 habitat?

14 A. Whenever you have gravel mining or gravel burrowing in a
15 water body like the Illinois River, you're impacting the
16 chemical, physical and biological biota and characteristics of
17 the stream.

18 Q. Let's talk for a moment about nurseries. You had said
19 something during your pervious testimony that I wanted to talk
20 to you about. Is it your understanding, Mr. Fite, that -- or
21 is it your belief, Mr. Fite, that there is monitoring going on
22 with regards to any outflow from the nurseries in the Illinois
23 River Watershed?

24 A. At this point in time, I don't know what the relationship
25 is between the Department of Ag and the nursery operations.

1 Q. Would it surprise you to know that there is no monitoring
2 of any outflow from the nurseries?

3 A. It would.

4 Q. If Mr. Sancho Dickinson testified that there is no
5 monitoring, would you have any reason to disagree with him?

6 A. No.

7 Q. Thank you, Mr. Fite. I appreciate your time.

8 A. Thank you.

9 THE COURT: Mr. Garren.

10 MR. GARREN: I didn't know whether you wanted to
11 break for Terri or not.

12 THE COURT: We'll wait for about seven to eight
13 minutes.

14 MR. GARREN: A little bookkeeping issue here, Judge.
15 I believe the Defendants' Exhibit 2211-02 was the only page
16 offered, but is a two-page document. I believe you indicated
17 that the entire document was admitted. I just wanted to clear
18 that up.

19 THE COURT: Which one?

20 MR. GARREN: 2211-02 was the document being offered,
21 as I understood, and not the entire two pages.

22 THE COURT: That is what was offered, this one page.
23 I did notice it's the second of two pages. I don't have the
24 first page, so I don't know whether it would be hearsay.

25 MR. GARREN: I think you said 2211 will be admitted,

1 but I think in actuality since it's two pages, it would be 02
2 of 2211.

3 THE COURT: Good point. That's Defendants' Joint
4 Exhibit 2211, page 2 is admitted.

5 MR. GARREN: Thank you, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. GARREN:

8 Q. Mr. Fite, you've had an opportunity to list a lot of your
9 concerns here today on cross-examination, and I'd like to ask
10 you about some of those myself.

11 With regard to the written concerns that were
12 submitted through Enercon to this Watts facility, how many
13 people or -- sewage is treated at Watts, do you know?

14 A. I would estimate between 3- and 400 individuals.

15 Q. All right. And with regard to some of the concerns that
16 you express on the Watts lagoon, it talks about natural seeps
17 and springs occurring in the area. Is that comment with regard
18 to certainly the Oklahoma side of the Illinois River Watershed,
19 you find seeps and springs occurring in all of the watershed?

20 A. Yes.

21 Q. And if land-applied poultry waste was land applied on or
22 near those particular areas, would that cause concern to you
23 for the poultry waste being introduced into the watershed?

24 A. Yes.

25 Q. And with regard to your concern as expressed to this being

1 a hydrogeologically sensitive area, would you express that
2 concern for poultry waste being land applied also?

3 A. Yes.

4 Q. And you've expressed concern that the river can actually
5 back up and inundate land application areas. Have you
6 personally observed areas of land application that were in a
7 floodplain?

8 A. Yes.

9 Q. And, likewise, would there be concern with floods or high
10 waters occurring, cleansing those fields of the poultry waste
11 that's been land applied on it?

12 A. Yes.

13 Q. Would you also have concerns that there is no runoff
14 prevention controls provided by the various users of the
15 poultry land-applied waste?

16 A. Yes.

17 Q. Have you observed many or any applying any type of
18 prevention controls for runoff on various fields that you
19 observed in the Illinois River Watershed?

20 A. Only the establishment of riparian buffer zones.

21 Q. Your agency is doing its best to re-establish those, is it
22 not?

23 A. Yes, in cooperation with stakeholders.

24 Q. Do you have any concern with regard to inadvertent or
25 advertent negligence of land-applied poultry waste occurring

1 within the watershed and proposing or causing concern to the
2 water quality of the river?

3 MS. LONGWELL: Objection, Your Honor. The question
4 calls for a legal conclusion and then negligent conduct of an
5 individual.

6 THE COURT: Overruled. Go ahead.

7 Q. (By Mr. Garren) Does that cause concern for you with
8 regard to the handling and disposition of poultry waste, sir?

9 A. Yes.

10 Q. Do you know whether or not there are contaminants found in
11 poultry waste such as heavy metals, organic matter, bacteria,
12 viruses, etcetera?

13 MR. ELROD: Your Honor, I object. We can't let this
14 case get into things that are not contaminants of concern,
15 which they've clearly said are bacteria and phosphorus. We'll
16 be here for an extra week.

17 MR. GARREN: I'll rephrase.

18 Q. (By Mr. Garren) With regard to bacteria and phosphorus,
19 does that cause concern for you for contaminants reaching the
20 Illinois River Watershed or its tributaries from land-applied
21 poultry waste?

22 A. Yes, as I've demonstrated through my testimony.

23 Q. In fact, sir, you have -- for many years had taken the
24 opportunity and the efforts to speak directly with many of the
25 poultry integrator defendant representatives, corporate

1 officers and executives, have you not?

2 MR. GREEN: Your Honor, we've had a series of leading
3 questions. This is another example.

4 THE COURT: Sustained.

5 Q. (By Mr. Garren) What effort have you taken, sir, to
6 express your concerns of those items that we've just talked
7 about to corporate representatives and executives of poultry
8 integrator defendants?

9 THE COURT: I think we've been over that, haven't we,
10 adequately, Mr. Garren?

11 MR. GARREN: I'd just like to hear it again, Judge.

12 THE COURT: You stand alone, Mr. Garren.

13 MR. GARREN: But I am standing. All right. I'll
14 move on.

15 Q. (By Mr. Garren) Do you consider -- as in your letter to
16 Mr. Thompson discussing excessive nutrients on lands adjacent
17 to scenic rivers, do you consider that to include land-applied
18 poultry waste, sir?

19 A. Yes.

20 Q. You wrote a letter in August of 2004 on the stationery of
21 the Scenic Rivers Commission addressing the issue of commercial
22 fertilizer, correct? That's Defendants' 1079.

23 A. Yes.

24 Q. Did you voluntarily write that letter, or were you
25 instructed to?

1 A. This was a letter as a result of action taken by the board
2 of directors that I report to on their August 17 regular
3 business meeting.

4 Q. And what is the concern with the commercial fertilizer
5 used in the basin, sir?

6 A. The Board of Commissioners and staff believe that it
7 should be all-encompassing, not to pick out just one party.
8 That if there's going to be too much fertilization in the
9 basin, for instance, the poultry waste, then the same should
10 hold for the commercial fertilization. It's a nutrient-
11 sensitive watershed.

12 Q. That concern about that particular commercial nutrient is
13 just what?

14 A. It's just as dangerous -- or not as dangerous. But it
15 will grow algae just as well as the poultry waste will.

16 Q. How does it do that when you put it on the land?

17 A. It will wash off with runoff from the rains.

18 Q. Not any different than poultry waste, is it?

19 A. No difference.

20 Q. You made a comment about this 60,000 gallons of waste this
21 year in '04 that was being removed. Did that include permanent
22 facilities, did I hear you to say?

23 A. Yes.

24 Q. And there are how many permanent facilities?

25 A. There's 12 or 13. I'm having trouble with my math today.

1 Q. Do any of those permanent or portable facilities come
2 loaded already with gallons of treating-type liquids,
3 sanitizers, things of that nature?

4 A. Yes.

5 Q. So to the extent that you're speaking of gallons of waste,
6 it really includes some of that which is already in the
7 container, correct?

8 MR. ELROD: Objection, leading.

9 THE COURT: Sustained. Rephrase.

10 Q. (By Mr. Garren) Do they come with contaminant liquids --
11 or disinfecting liquids in the facility when they are
12 delivered?

13 A. And also smell abatement, yes, to the tune of about 20
14 gallons, 25 gallons.

15 Q. Is that per facility?

16 A. Per cleaning. Those facilities were cleaned twice a
17 week. 17 would be 34 cleaned once a week.

18 Q. Would that be included in the 60,000 gallon number that
19 you alluded to?

20 A. Yes.

21 Q. Do you know how many gallons are contained in the honey
22 wagon similar to the one we saw in the picture earlier?

23 A. Depends on the size of the tank and vehicle.

24 Q. Do you have a range of what you know those can contain?

25 A. Anywhere from 1500 gallons up to 4000.

1 Q. And do you know, how often is a single truck used for
2 application -- let me restate. That's kind of crazy.

3 Are multiple applications of a truck utilized on a
4 field when an application occurs using these honey wagons?

5 A. These trucks will go back and refill and come back and
6 finish a field if they don't complete it with the first load.

7 Q. Do you have any idea what the per-gallon, per-acre
8 application rate is by those honey wagons?

9 A. I do not.

10 Q. You were -- let me go back to when Mr. Elrod was cross-
11 examining you, and he talked about --

12 THE COURT: Mr. Garren, I'm going to interrupt. It's
13 time for our midafternoon recess. We'll take about 15 minutes.

14 (Whereupon a recess was had.)

15 THE COURT: Mr. Garren.

16 MR. GARREN: Thank you, Your Honor.

17 Q. (By Mr. Garren) Mr. Fite, earlier Mr. Elrod took you up
18 the river and pointed out numerous cattle operations. Do you
19 recall that testimony?

20 A. Yes.

21 Q. You have observed the operations in these areas, have you
22 not?

23 A. Yes.

24 Q. And have you observed the land application of poultry
25 waste in those cattle operations?

1 A. On some, yes.

2 Q. Have you, in fact, received complaints at any time about
3 people becoming sick, having visited the river?

4 A. Yes.

5 Q. And as a result of receiving those complaints, what did
6 you do?

7 A. The most recent would have been this summer and -- just
8 thinking out loud, a lady called in and said there were a
9 couple of individuals from --

10 MR. GREEN: Your Honor, I object. Hearsay.

11 MR. WEEKS: Object. Hearsay.

12 THE COURT: Sustained.

13 Q. (By Mr. Garren) As a result of your receipt of that
14 call --

15 A. I forwarded that concern to the Department of
16 Environmental Quality.

17 Q. Do you know whether or not there was any follow-up report
18 made to your agency about that?

19 A. There has not been.

20 Q. Mr. Elrod made the point that Benton and Washington County
21 and parts of Delaware and Adair County are, "the largest
22 cattle-producing areas." How would you characterize those same
23 areas for producing poultry?

24 A. Poultry waste on the land is what's made those areas able
25 to support the cattle that they have.

1 Q. And how would you characterize the number or concentration
2 of the poultry-growing operations in those areas?

3 A. More so than in the Cherokee County where I live.

4 Q. How would you characterize the volume of commercial
5 fertilizer use, based on your observations from that of the use
6 of land-applied poultry waste in the basin?

7 MR. GREEN: I don't see how the witness would be in a
8 position to make that assessment.

9 THE COURT: Sustained.

10 Q. (By Mr. Garren) Based on your observations, have you
11 observed commercial fertilizer being applied?

12 A. Yes.

13 Q. And how do you know that that's what's being done?

14 A. Type of buggy or vehicle used to land apply the material.
15 There's a difference between poultry waste, which once it's
16 been applied, it's a different type of vehicle, but it leaves a
17 dust stream behind the vehicle as it's land applying; whereas,
18 commercial fertilization has very little associated dust and
19 particulates behind the buggy.

20 Q. The buggy, what size is it in comparison to a typical
21 spreader truck that you see in the watershed?

22 A. Typically three to four tons.

23 Q. How does that compare to a spreader truck?

24 A. The spreader truck is going to be more bulky material.
25 Poultry waste is bulkier than commercial fertilization.

1 Q. Is that truck larger than its bed?

2 A. The poultry applicator vehicle would be bigger than the
3 commercial fertilization.

4 Q. Now, I believe Mr. Green asked you about what all has been
5 humanly possible to be done. And other than your writing
6 letters or resolutions coming from your Commission, have there
7 been other things that you have done to attempt to preserve and
8 protect the watershed in particular from poultry waste being
9 land applied in the watershed?

10 MR. GREEN: Object to the form of the question. The
11 questions I had of the witness were not what he did that
12 qualifies as the most one humanly can do, but whether the
13 State's activities or particular lack of activity by the State
14 amounted to undertaking all humanly possible initiatives.

15 THE COURT: Overruled. This is in the context of
16 Oklahoma Scenic River Commission, correct?

17 MR. GARREN: Correct.

18 THE COURT: Overruled. Go ahead.

19 THE WITNESS: Please repeat the question.

20 MR. GARREN: Can I just have you read it back,
21 please.

22 (The requested portion was read back by the court
23 reporter.)

24 THE WITNESS: Yes.

25 Q. (By Mr. Garren) Tell the Court what you've done other than

1 things maybe we've already heard today, to make it quicker and
2 easier for the Court.

3 A. Related to poultry waste?

4 Q. Yes.

5 A. Conservation easements. Visiting with integrators,
6 suggesting that they move the waste to areas that proper
7 disposal or land application for nutrient uptake could be
8 accomplished. Looking at taking waste to energy possibly.
9 Looking at developing a fuel source out of it outside of
10 burning it. Looking at it as a feed supplement after it's been
11 composted. A number of things.

12 Q. They showed you a list of BMPs. Have you seen that list
13 before or something similar to it?

14 A. Yes.

15 Q. And do you feel like that particular list is, by itself,
16 sufficient to mitigate land-applied poultry waste from entering
17 the waters of the Illinois River Watershed?

18 MR. ELROD: I object, Your Honor, it calls for
19 opinion testimony.

20 MR. GARREN: Seems to me the defendants have been
21 asking his opinion all afternoon, Judge, and I thought this was
22 right up the same alley when they talked about the various
23 aspects of the BMPs, whether you would modify it, would you
24 address it differently. And I'm trying just to follow up on
25 that same question.

1 MR. WEEKS: I don't believe those questions were
2 asked, Your Honor. I think he volunteered those answers about
3 the extent to which he may modify or -- but those questions
4 weren't asked.

5 THE COURT: I think in a way, it's the reverse side
6 of the coin as to whether or not the State has done all that's
7 humanly possible. Overruled. You may answer.

8 Q. (By Mr. Garren) Do you remember the question?

9 A. I do not.

10 MR. GARREN: Can you read it back one more time.

11 (The requested portion was read back by the court
12 reporter.)

13 THE WITNESS: I remember the question now. No.

14 Q. (By Mr. Garren) And what do you think would be important
15 as a BMP, if you had an opportunity to add to that list?

16 A. First and most important thing would be to have an
17 appropriate soil sample of the subject field for which land
18 application is going to be placed thereon.

19 Q. And how does that, in and of itself, assist or mitigate
20 the problem that you think exists?

21 A. It controls oversaturation, overapplication, base and --
22 base application on agronomic uptake of the particular plant
23 that's being targeted. If it's grass, you're going to have one
24 level. If it's alfalfa, you're going to have a different
25 level, so forth.

1 Q. So you're suggesting that it be applied at the rate that's
2 shown necessary under appropriate soil test?

3 A. Specific to that field --

4 MR. GREEN: Objection, leading, Your Honor.

5 THE COURT: Sustained. Rephrase.

6 Q. (By Mr. Garren) What is it you're suggesting with regard
7 to the benefit of the soil test?

8 A. Soil -- there should be a soil test on every parcel of
9 land in which poultry waste or any other fertilization is going
10 to be land applied or incorporated. If not, then you're
11 wasting economic value of that resource and you're causing
12 environmental degradation.

13 Q. We're seeing soil tests being taken now, are we not? Is
14 it in Oklahoma a requirement to have a soil test?

15 A. I have an opinion about soil testing, and I don't
16 believe --

17 MR. GREEN: Objection. Nonresponsive.

18 THE COURT: Sustained.

19 Q. (By Mr. Garren) Is it correct that we do have soil tests
20 being conducted today?

21 A. Yes.

22 Q. So how is it that a soil test, based on your previous
23 answer, change --

24 A. All soil tests are not uniform.

25 Q. What is the purpose behind having a soil test?

1 A. To tell you what the constituency of available nutrients
2 within that parcel of land that's being sampled contain.

3 Q. Once you know that, what -- how does that help?

4 A. Helps you to develop your strategy for what nutrients that
5 you would incorporate to grow a particular crop or grass.

6 Q. Now, Mr. Weeks pointed out how George's had, at least by
7 inference, responded to your pleas of changing behavior in the
8 land application of poultry waste.

9 When George's was applying in the property in the
10 Chance, Oklahoma area, do you have personal knowledge of where
11 that waste came from?

12 A. Yes.

13 Q. Where was it?

14 A. It was coming from outside the state of Oklahoma.

15 Q. Do you know where outside the state?

16 A. Yes. At one of their corporate farms.

17 Q. Mr. Tucker talked about balancing the interest, and he
18 mentioned ranchers, cattlemen, developers. I don't recall --
19 maybe you might -- did he mention poultry growers and handling
20 and disposition of poultry waste?

21 A. I don't recall.

22 Q. Do you think his list is adequate, based upon what he
23 believes is necessary to balance the interest in the Illinois
24 River Watershed?

25 A. I believe all stakeholders should be included.

1 Q. Would that include the use, handling and disposition of
2 poultry waste?

3 A. Yes. Poultry companies and poultry growers are as
4 important to the overall synergy of an approach to the
5 watershed as any other group or stakeholder.

6 Q. Isn't it a fact, sir, that they might be creating or
7 producing more waste than any other element within the
8 watershed?

9 A. That is potentially correct, yes.

10 MR. GREEN: Objection, Your Honor, leading.

11 THE COURT: I'm sorry. The basis?

12 MR. GREEN: Leading.

13 THE COURT: Leading? I'm sorry, I didn't hear the
14 basis. Sustained. Rephrase. And the answer is stricken.

15 MS. LONGWELL: Your Honor, we also object with
16 regards to it asking for a causation opinion.

17 THE COURT: Sustained on that basis as well.

18 Q. (By Mr. Garren) Have you seen the numbers of waste --

19 MR. GARREN: Are you just burning calories,
20 Mr. Green, or are you intimidating the witness?

21 MR. GREEN: Just burning calories, and this allows me
22 to hear a little better than when I'm seated. So I hope I'm
23 not bothering --

24 MR. GARREN: Some witnesses would be intimidated and
25 distracted by it, Judge. And I know it's been happening --

1 THE COURT: I don't think Mr. Fite is intimidated by
2 much.

3 THE WITNESS: I just thought he wanted to look at my
4 good looks.

5 MR. GREEN: Stipulate.

6 THE WITNESS: Stimulated? Oh, no, we've got to get
7 out of here.

8 Q. (By Mr. Garren) Mr. Fite, do you know whether or not,
9 based upon your personal observations, travel and experience in
10 the watershed, poultry waste is tilled into the soil when it's
11 applied?

12 A. It is not.

13 Q. You were questioned about 400,000 recreators being within
14 the Illinois River Watershed. Those are not all floaters; is
15 that correct?

16 A. That's correct.

17 Q. So can you kind of categorize some of the recreators or
18 list them for the judge that you're trying to include in that
19 number.

20 A. Approximately 150- to 180,000 are going to be potential
21 floaters that will utilize the river by inner tube, kayak,
22 canoe, or raft. The remaining numbers would be swimmers,
23 fisherman, campers, day users, hunters, equestrian tours,
24 mountain bike rides, motorcycle poker runs. Did I say
25 hunting? Hunting. And foliage tours in the fall. Spring

1 foliage tours. Church baptisms. Church retreats. Groups like
2 Alcohol Anonymous, Narcotics Anonymous, groups like that coming
3 to some of the places along the river. We have New Life
4 Ranch. Heart of the Hills Salvation Army camp. Camp Egan.
5 Camp Lutherhoma. A number of church outcamps that bring
6 children to the Basin annually for spiritual enhancement and
7 recreation.

8 You have many, many universities that come to the
9 Illinois River to study everything from geography to water
10 quality to other issues from Northeastern State University,
11 Tulsa University, Oklahoma State University, OU. Have Cameron,
12 Murray State, University of Arkansas, Arkansas State. The list
13 goes on and on. But there is approximately 4- to 500,000
14 people that use the river for one purpose or another.

15 Q. They're not all taking restroom breaks inside the river,
16 are they?

17 A. No.

18 MR. GARREN: No other questions, Your Honor.

19 MR. ELROD: Your Honor, for humanitarian reasons, I
20 have no further questions.

21 THE COURT: Any other recross?

22 MR. GREEN: I've got a couple.

23 THE COURT: Mr. Green.

24 MR. GREEN: Very quickly.

25

1 A. What part?

2 Q. Central Minnesota.

3 A. The reason I asked is that everyone knows who I am,
4 apparently, in Oklahoma. And anyone that knows me by name
5 knows that I have been the one beating the drums to protect our
6 scenic rivers since 1983. And every week, someone says, this
7 Ed Fite guy says something in the paper. So I would say yes.

8 Q. I'm not here to deny you the credit that you deserve for
9 your --

10 A. I don't want any credit. I'm just saying --

11 Q. But it does sound, sir, having listened to your testimony,
12 and having listened to the specific answers that you've given
13 to some of the other lawyers who have stood at this podium here
14 this afternoon and this morning and questioned you, that all
15 roads seem to lead to Rome. Do you know what I mean by that?

16 A. When I am in Rome, I do as the Romans do.

17 Q. All of these concerns that you have exhibited and
18 expressed, they are concerns which can legitimately be dealt
19 with by the government of the state of Oklahoma; is that not
20 correct?

21 MR. GARREN: Objection, Your Honor, it calls for a
22 conclusion, some speculation, and certainly outside the scope,
23 as evidenced here today from the Scenic Rivers Commission
24 standpoint.

25 THE WITNESS: I certainly wish that I had --

1 THE COURT: Overruled. Go ahead, sir.

2 THE WITNESS: I certainly wish I had your expertise
3 and all the other lawyers that are in this room to help me wage
4 that battle in the State House.

5 Q. (By Mr. Green) Okay. And perhaps that's where it ought to
6 be waged rather than in this courtroom; isn't that correct,
7 sir?

8 A. I'm talking about if I had your expertise, some of the
9 issues that we're dealing with here today might have been
10 evaded.

11 Q. Have you been to the State House to petition the State
12 House --

13 A. Yes.

14 Q. -- with respect to your concerns?

15 A. Yes.

16 Q. And you're still waiting for relief; is that right?

17 A. It's hard for me to go up against the farm lobby.

18 Q. Very well, sir.

19 MR. WEEKS: I can't help myself, Your Honor. Just a
20 couple of quick questions here.

21 RECROSS EXAMINATION

22 BY MR. WEEKS:

23 Q. If we could put Addendum D back up there, because I never
24 intended to suggest to you -- and you understood this, I'm
25 sure, Mr. Fite -- that the BMPs was the answer to the poultry

1 litter application question. You understood that, didn't you?

2 A. Yes, sir.

3 Q. You understood that that predated any regulations or laws
4 that were in place here in the state of Oklahoma, correct?

5 A. Yes, sir.

6 Q. And that it was an interim measure in an effort to do
7 something, correct?

8 A. Yes, sir.

9 Q. In fact, at the very top of it, it says -- at that time,
10 you could get a nutrient management plan from the government,
11 couldn't you, sir?

12 MR. GARREN: Object to form.

13 Q. (By Mr. Weeks) Did you know at that time you could get a
14 nutrient management plan from the government?

15 MR. GARREN: I'd ask that "the government" be defined
16 here, Your Honor, whether we're talking about the federal
17 government or the state government.

18 THE COURT: Sustained.

19 Q. (By Mr. Weeks) Were you aware that the federal government
20 would undertake to provide a plan?

21 A. Producers didn't understand it under those words. They
22 either saw it as a farm plan, farm management plan or ranch
23 management plan, but not a nutrient management plan. That's a
24 new concept.

25 Q. You understood what I'm talking about, right? So prior --

1 well, this particular document says it's recommended that a
2 grower get one of those. But in the interim, until you do,
3 this is what's in place. And you understood it that way,
4 didn't you?

5 A. Yes.

6 MR. GARREN: Judge, I'm going to object because we're
7 talking about a document this witness has failed to be able to
8 identify, said he hadn't seen it before. We've gone through
9 the document at this point. Again, he's never seen the
10 document.

11 MR. WEEKS: He just asked him about how adequate he
12 thought it was, Your Honor, so apparently he's talking about
13 it.

14 THE COURT: The objection is overruled. And the
15 answer was elicited prior to the objection. Go ahead,
16 Mr. Weeks.

17 Q. (By Mr. Weeks) Now, I wanted to go back to -- you talked
18 about this twice now -- to Chance, Oklahoma. And you said that
19 there was some application of the liquid manure in Chance,
20 Oklahoma by George's, correct?

21 A. Yes.

22 Q. Now, the first time I heard you testify about that, you
23 said this occurred back in the '80s, is my recollection. Am I
24 right about that?

25 A. The '80s would have been at Dean Wilmoth's property.

1 Q. So this has occurred since then, is what you're saying?

2 A. Yes.

3 Q. And to your knowledge -- to your knowledge, is the land on
4 which it is applied permitted to accept that?

5 MR. GARREN: Object to the form "permitted,"
6 Your Honor.

7 MR. WEEKS: "Permitted" is permit, gets a permit.
8 You've got to have a permit.

9 MR. GARREN: Ask the foundation be laid as to whether
10 or not this witness knows whether or not a permit is, in fact,
11 required or necessary.

12 THE COURT: All right. Sustained. Rephrase, please.

13 Q. (By Mr. Weeks) Mr. Fite, you testified earlier that if
14 biosolids were being sprayed in the watershed that you would
15 have to get a permit from Oklahoma Department of Environmental
16 Quality, didn't you, sir?

17 A. For municipal or industrial biosolids.

18 Q. Now, do you know if that's the same agency that
19 provides -- that permits the property for this stuff, for the
20 liquid manure to go down?

21 A. For agricultural biosolids, that's going to be Dan Parrish
22 at the Oklahoma Department of Agriculture, Food and Forestry.

23 Q. And he actually issues a permit for that, don't they, sir?

24 MR. GARREN: Objection, Your Honor, failed -- again,
25 failure to have a foundation of what ODAFF does.

1 THE COURT: Counsel is well familiar with this
2 dispute as to whether this constitutes permit or not. Let's
3 just --

4 MR. WEEKS: This is different, Your Honor.

5 THE COURT: Let's just -- can I finish my sentence?

6 MR. WEEKS: I'm sorry.

7 THE COURT: If we're talking about an Animal Waste
8 Management Plan, let's talk about that and get away from this
9 definition of a permit here. The Court will decide that
10 issue. Sustained. Rephrase.

11 Q. (By Mr. Weeks) With regard to the application of liquid
12 fertilizer, isn't it true, sir, that the State has to issue an
13 actual permit for that liquid manure to be put on that
14 property?

15 MR. GARREN: Again, Your Honor, my objection is to
16 the foundation for this --

17 MR. WEEKS: He either knows or he doesn't.

18 THE COURT: Once again, Mr. Weeks, allow Mr. Garren
19 to complete his sentence so I know the basis for his
20 objection. We've got two good advocates, and sometimes we have
21 to just allow somebody to finish their sentence.

22 Go ahead, Mr. Garren.

23 MR. GARREN: We're in Oklahoma on the application
24 side, and I don't think there's been any foundation that a
25 permit, as the term is being used by counsel, is required, let

1 alone that this witness knows that there is such a --

2 THE COURT: As before, the objection is sustained.
3 You may rephrase.

4 Q. (By Mr. Weeks) Did you know -- or do you know, Mr. Fite,
5 if in the state of Oklahoma that an actual permit for the land
6 application of liquid fertilizer, poultry fertilizer, is
7 required before it can be land applied? I'm not talking about
8 a nutrient management plan. I'm talking about an actual
9 permit.

10 A. That's a question that I have to rely on Dan Parrish at
11 ODAFF to answer.

12 Q. So you wouldn't know if the land where this is applied is
13 permitted for this purpose --

14 A. That's correct.

15 Q. -- correct?

16 A. That's correct.

17 Q. Very good. Very good. When we previously talked about
18 the litter that was being transported out of the Illinois River
19 Watershed by George's and which has been transported beginning
20 in 2003 to the present, did you understand that George's has
21 control of that litter that it's actually taking out of the
22 watershed?

23 A. Yes.

24 Q. You understood that was coming off of company-owned or
25 operated or managed farms, right?

1 A. Yes.

2 MR. WEEKS: No further questions.

3 THE COURT: Are we talking -- just for my education
4 here, are we talking about the permit required of someone who
5 actually applies the liquid manure? Is that what we're talking
6 about here?

7 MR. WEEKS: What we're talking about here,
8 Your Honor, is that that liquid manure can only be applied on
9 permitted land.

10 THE COURT: All right. Well, then, you've got to
11 educate me as to that.

12 MR. GARREN: I'd like a citation to that,
13 Your Honor. He may be speaking to Arkansas, but --

14 THE COURT: I've not seen that, but perhaps it's
15 true. In any event, another issue for us.

16 Go ahead, Mr. Sanders.

17 MR. SANDERS: Very briefly, Your Honor.

18 RE CROSS EXAMINATION

19 BY MR. SANDERS:

20 Q. Mr. Fite, it was the State of Oklahoma that removed the
21 Scenic Rivers Commission's jurisdiction over that segment of
22 the Barren Fork where gravel mining is going on; is that
23 correct?

24 A. No. That gravel mining operation for Mr. Worley, if
25 that's who you're alluding to --

1 Q. Yes.

2 A. -- is located approximately one mile upstream of the
3 portion of the Barren Fork Creek that is designated an Oklahoma
4 scenic river.

5 Q. Okay. Well, all right.

6 A. The Barren Fork is designated from downstream of that
7 gravel operation at the Barren Oklahoma bridge at US 59 where
8 it crosses the Barren Fork Creek.

9 Q. Let me ask it this way: Is the scenic river designation,
10 is that controlled by the State of Oklahoma?

11 A. Yes.

12 Q. And it is the State of Oklahoma's choice that that segment
13 of the Barren Fork not be included within the scenic river
14 area; is that correct?

15 A. Yes. Since 1970, that decision has been made.

16 Q. Okay. So it is the State of Oklahoma's policy choice to
17 allow gravel mining to continue at Barren Fork today; is that
18 correct?

19 A. The State of Oklahoma has been engaged or currently still
20 engaged in litigation against Mr. Worley. I don't know the
21 resolution of that.

22 Q. There's an ongoing civil action to enjoin that?

23 A. Yes.

24 Q. Thank you.

25 MR. TUCKER: No thank you, Your Honor

1 MS. LONGWELL: I have no questions.

2 THE COURT: Very well.

3 MR. GARREN: Thank you, Your Honor.

4 THE COURT: You may be excused.

5 THE WITNESS: Judge, I'd like to invite you to come
6 to the river take a kayak trip with me, and we will have a
7 conversation hopefully that won't be objected to.

8 THE COURT: Mr. Fite, if it would get me recused, I'd
9 be happy to. Maybe after this litigation is all over. Thank
10 you, sir.

11 The plaintiff may call its next witness.

12 MR. NANCE: Your Honor, the State of Oklahoma calls
13 Shanon Phillips.

14 (Witness sworn.)

15 THE COURT: Would you state your full name for the
16 record, please.

17 THE WITNESS: Shanon Phillips.

18 SHANON PHILLIPS,
19 having been first duly sworn, was called as a witness and
20 testified as follows:

21 MR. BULLOCK: While we're doing that, could Mr. Fite
22 be excused from the Rule? He'd like to stay and watch some of
23 it.

24 THE COURT: Any objection?

25 MR. WEEKS: Not from George's, Your Honor.

1 MR. ELROD: I don't think so, Judge.

2 MR. HOPSON: No objection, Your Honor.

3 MR. SANDERS: No objection, Your Honor.

4 MR. TUCKER: No objection.

5 THE COURT: Hearing no objection, Mr. Fite, you're
6 welcome to stay, sir.

7 You may inquire.

8 DIRECT EXAMINATION

9 BY MR. NANCE:

10 Q. Ms. Phillips, would you tell the Court, please, what you
11 -- what your job is at the present time.

12 A. I'm the director of the Water Quality Division of the
13 Oklahoma Conservation Commission.

14 Q. Would you give the Court a brief overview of the mission
15 of the Oklahoma Conservation Commission.

16 A. The mission of the Conservation Commission is to conserve,
17 protect and restore Oklahoma's natural resources in cooperation
18 with conservation districts and our other conservation
19 partners.

20 Q. Would you tell the Court, please, what your formal
21 education is.

22 A. I have a bachelor's degree in biology from Kansas State
23 University and a master's degree in zoology from Oklahoma State
24 University.

25 Q. When did you get your bachelor's degree from Kansas State?

1 A. In 1990.

2 Q. And your zoology master's from OSU?

3 A. 1995.

4 Q. What kind of work did you do, just very briefly, in your
5 master's degree in zoology? What were your topics of study?

6 A. I focused on aquatic ecology, and the topic of my research
7 was nutrient limitation in Lake Tenkiller.

8 Q. Have you begun any work on a Ph.D.?

9 A. Yes.

10 Q. Have you completed that?

11 A. No.

12 Q. Let's talk for a moment, if we can, about your
13 professional job history, starting -- well, back when you were
14 at OSU, if you would, please.

15 A. I was a research assistant for the water quality research
16 laboratory at OSU.

17 Q. What kind of work did you do in the water quality research
18 lab?

19 A. We did field work and laboratory analysis, mostly studying
20 lakes in the state of Oklahoma.

21 Q. What was your next job after you were a research assistant
22 at OSU?

23 A. I was a Carl Albert executive fellow at the Oklahoma Water
24 Resources Board in their Water Quality Division.

25 Q. When did you start with the Water Resources Board?

1 A. In 1995.

2 Q. As a Carl Albert executive fellow, what did you do for the
3 Water Resources Board?

4 A. I studied lakes in the state of Oklahoma, field work and
5 focused primarily on clean lake 314 studies.

6 Q. When you say, "clean lake 314 studies," what do you mean?

7 A. EPA -- under the Clean Water Act, Section 314 focuses on
8 clean lake studies, their diagnostic and feasibility studies.

9 Q. What lakes did you look at in doing that work for the
10 Water Board?

11 A. Lake Wister, Lake Henrietta, and Lake Arcadia primarily.

12 Q. Did you do any work in Tenkiller?

13 A. I did participate in summer field sampling as part of
14 their lakes assessment program on Lake Tenkiller.

15 Q. What was your next professional position after working for
16 the Water Board?

17 A. I was a technical writer at the Conservation Commission.

18 Q. When did you begin at the Conservation Commission?

19 A. In 1997.

20 Q. What kind of things did you do as a technical writer?

21 A. We -- I analyzed data that had been collected by our field
22 monitoring staff and wrote reports on that data.

23 Q. Just in the broad strokes, what kind of reports did you
24 write?

25 A. Technical reports summarizing data collection for EPA,

1 Clean Water Act Section 319 projects.

2 Q. What was the next position you held after being a
3 technical writer?

4 A. I was the senior technical writer and quality assurance
5 officer.

6 Q. Also at the Conservation Commission?

7 A. Yes.

8 Q. What did you do as a senior technical writer?

9 A. I was in charge of assuring that the various reports we
10 were required to produce for EPA were assigned to the staff of
11 writers and that they were completed according to EPA
12 requirements.

13 Q. And what position did you next have?

14 A. I was the assistant director of the Water Quality
15 Division.

16 Q. What did you do as the assistant director of the Water
17 Quality Division?

18 A. I assisted the director and drafted the work plans that
19 defined the work that would be completed by the division using
20 EPA 319 funds.

21 Q. Approximately when did you become the assistant director?

22 A. Approximately in 2005.

23 Q. Okay. Did you have any budgetary responsibilities for the
24 agency?

25 A. Yes. My responsibility was to estimate the budgets that

1 would be necessary to complete the work required by EPA and
2 then track the spending related to those work plans and
3 projects and make adjustments if we were off course on budgets.

4 Q. When did you become director of the Water Quality
5 Division?

6 A. In March of this year.

7 Q. And what are your responsibilities as director of the
8 Water Quality Division?

9 A. I'm responsible for overseeing a staff of over 40
10 individuals who focus on our carbon sequestration program, our
11 319 nonsource program and our wetlands program.

12 Q. In the broad strokes, just as an overview, Ms. Phillips,
13 could you tell us how the Conservation Commission conserves and
14 protects the natural resources of the state, particularly in
15 the Illinois River Watershed.

16 A. The Conservation Commission has a water quality monitoring
17 responsibility. We have monitoring staff who evaluate the
18 status of waters in the Illinois River. We also have an
19 education program that works to address and educate citizens
20 about nonpoint source pollution in the watershed. Then we also
21 offer through a cost share program incentives to encourage
22 landowners to adopt Best Management practices.

23 Q. Is that the 319 program?

24 A. It is, in part, the 319 program.

25 Q. Tell the Court, please, what the 319 program is.

1 A. 319 is the section of the Clean Water Act that focuses on
2 nonpoint source pollution and specifically on nonregulated
3 types of nonpoint source pollution.

4 Q. Tell the Court briefly what nonpoint source pollution is.

5 A. Nonpoint source pollution, as opposed to point source
6 pollution, is point sources that comes from diffused sources,
7 often results from runoff of pollutants over land surface as
8 opposed to point sources that comes from a specific place in
9 time, such as an outfall from a discharge or a discharge from a
10 wastewater treatment plant or an industrial site.

11 Q. Does the Oklahoma Conservation Commission, from time to
12 time, work with local conservation districts?

13 A. Local conservation districts are our primary partners.

14 Q. Does the Conservation Commission have any regulatory
15 jurisdiction as such?

16 A. No.

17 Q. Does the Conservation Commission have any regulatory
18 jurisdiction whatsoever in the state of Arkansas?

19 A. No.

20 Q. Has the Conservation Commission ever undertaken any
21 remedial measures for the IRW in Arkansas?

22 A. The Conservation Commission has cooperated with Arkansas
23 state agencies to offer a litter transfer program that moved
24 litter out of the state of Arkansas in the Illinois River
25 Watershed.

1 Q. We'll return to that in some detail later. Has the
2 Oklahoma Conservation Commission studied remedies for nonpoint
3 source pollution in the Eucha-Spavinaw Watershed, next door to
4 the Illinois River?

5 A. Yes.

6 Q. Briefly, what has the Commission done there?

7 A. The Commission has monitored water quality in the Eucha-
8 Spavinaw Watershed and offered education programs, and then on
9 a cautionary basis, demonstrated practices that are necessary
10 to address nonpoint source pollution.

11 Q. Let's talk for a moment, Ms. Phillips, about your personal
12 experiences in the Illinois River Watershed. When did you
13 first have any contact with the watershed?

14 A. As a young child, probably around the age of two.

15 Q. How did you begin to get to know the watershed?

16 A. My grandmother taught at Northeastern State University,
17 and so we spent summers on Lake Tenkiller and playing in the
18 river, floating the river.

19 Q. Do you ever go back to the river these days?

20 A. Yes.

21 Q. Just as a lay observer, can you compare and contrast the
22 river and the lake as you knew them as a child and as you know
23 them now.

24 A. As a child, the waters were clearer and the rocks were
25 brightly colored. I remember there being yellows and reds, and

1 I collected them as a child. When we would float the river, my
2 parents would dump the canoe on purpose so they wouldn't have
3 to bring the rocks home. And the lake, you could see your feet
4 when you're swimming in the lake. Not just, you know, a
5 two-year-old's, but my parents could see their feet; whereas
6 now, you can't see the colors of the rocks because they're
7 colored -- they're coated with algae, so they're green or
8 brown. And you can't see past your knees when you swim in the
9 lake.

10 Q. What's the color of the water in the lake now?

11 A. It's -- it varies depending on where you are in the lake,
12 but it ranges from a brown to a deep green.

13 Q. When you were doing graduate school work, did you do some
14 work in the Illinois River Watershed?

15 A. Yes.

16 Q. What did the watershed look like in those times, just kind
17 of intermediate from childhood to today?

18 MR. GREEN: Your Honor, this testimony -- I don't
19 mean to cut short counsel's interrogation, but it does begin to
20 be cumulative. We've heard quite a bit of testimony from
21 witnesses giving their personal assessments of the quality of
22 the water, both historically and currently, and I respectfully
23 suggest that this -- you know, continuing of this kind of
24 testimony is not leading us forward to the more appropriate
25 topics that this trial needs to reach.

1 THE COURT: Can we touch upon it and move on?

2 MR. NANCE: We'll move quickly, Your Honor.

3 THE COURT: Okay.

4 Q. (By Mr. Nance) Quickly tell us what things looked like
5 when you were a graduate student.

6 A. The river rocks were, again, coated with algae, but it was
7 more of a periphyton or diatom community as opposed to
8 currently there's more of a filamentous green algae community,
9 and the lake was not as -- the chlorophyll concentrations
10 weren't as high, so it was clearer than it is now, but not as
11 clear as when I was a child.

12 Q. If you could bring up Demonstrative No. 169. First of
13 all, Ms. Phillips, could you tell us if this picture was taken
14 in the Illinois River Watershed?

15 A. Yes.

16 Q. And where in the Illinois River Watershed was it taken?

17 A. This is Peach Eater Creek, a tributary of the Barren Fork
18 and the Illinois River Watershed.

19 Q. Was this picture taken by a representative or an employee
20 of the Oklahoma Conservation Commission?

21 A. Yes.

22 Q. And does it fairly and accurately represent conditions
23 that are commonly found in that part of the Illinois River
24 Watershed?

25 MR. GREEN: I object to "commonly found,"

1 Your Honor. This is a photograph. It depicts a condition on a
2 certain day at a certain time. I have no problem with the
3 witness identifying the date and the time, if she is competent
4 to do so, but to generalize and call this a picture of common
5 conditions, I object.

6 THE COURT: Sustained. Rephrase.

7 Q. (By Mr. Nance) Would you tell the Court, please, what kind
8 of algae appears in this picture.

9 A. You see attached periphyton growing on the rocks in the
10 water.

11 MR. TUCKER: If you don't mind, I'd like to have that
12 objection enforced. We don't know when this was taken or the
13 time of year, the time of day.

14 THE COURT: Can we find that out, Mr. Nance?

15 Q. (By Mr. Nance) Can you nail down the time and the location
16 as best you can where this picture was taken?

17 A. This was taken in the late fall or winter. I don't have
18 the exact month or year.

19 Q. Are there any wastewater treatment plants on Peach Eater
20 Creek?

21 A. No.

22 MR. TUCKER: I hate to interrupt, but my
23 understanding with a photograph, identify the photograph if
24 we're going to talk about it, we've got to -- if she didn't
25 take the photograph, it's -- she's going to be hard-pressed to

1 identify it specifically. I object to her talking about the
2 photograph until we have better identified who took it, whether
3 she took it, when she took it, where at Peach Eater Creek she
4 was when she took it, time of day, that kind of thing.

5 THE COURT: Sustained.

6 Q. (By Mr. Nance) You didn't take this -- or did you take
7 this picture?

8 A. No, I did not take this.

9 Q. Is this sort of situation something -- this sort of algae
10 seen often in the Illinois River Watershed?

11 A. Yes.

12 Q. And does it represent what is often seen in the Illinois
13 River Watershed?

14 MR. GREEN: Objection, Your Honor.

15 THE COURT: Sustained. Going back to the original
16 objection. Could you identify the word that you used
17 identifying the type of algae, however?

18 THE WITNESS: This is periphyton, or attached algae.

19 THE COURT: Could you spell that.

20 THE WITNESS: P-E-R-I-P-H-Y-T-O-N.

21 THE COURT: As opposed to filamentous?

22 THE WITNESS: As opposed to phytoplankton, which is
23 free-floating algae.

24 THE COURT: So --

25 THE WITNESS: Filamentous algae can be periphyton.

1 Periphyton is attached algae.

2 THE COURT: All right. Thank you. The objection is
3 sustained.

4 Q. (By Mr. Nance) Let us move to your -- to the graduate
5 school work you did in the Illinois River Watershed. Could you
6 tell the Court what it was you did when you were working in
7 graduate school in the watershed.

8 A. I was part of a research team, studying -- participating
9 in the 314 clean lake study on Lake Tenkiller, and I primarily
10 focused on nutrient limitation and algae in the lake.

11 Q. Would you tell the Court what you mean when you say
12 "nutrient limitation."

13 A. Nutrient limitation are the nutrients that control the
14 growth of algae community, so they're the nutrients that if you
15 added more of, there would be more algae growth and if you took
16 away, there would be less algae growth.

17 Q. And as a result of your studies in graduate school and
18 Lake Tenkiller, did you determine what the limiting factor for
19 algae was?

20 A. The limiting factor varied at certain points and during
21 times of the lake -- times of the year, but overall it was
22 determined to be limited by phosphorus.

23 Q. Let's pull back just a little bit from what you did in
24 graduate school and talk about what it is -- a little more
25 about what you do as director and how you've come to know about

1 the Illinois River Watershed.

2 Would you tell the Court briefly what it is you
3 specialize in as the water quality director.

4 A. As the water quality director, my main focus is nonpoint
5 source pollution and its effect on water quality.

6 Q. And as that job applies to the Illinois River Watershed,
7 is there any particular kind of nonpoint source pollution that
8 you specialize in?

9 A. Most of my work is focused on the effects of nutrients on
10 water quality.

11 Q. Does that include the effect of nutrients on
12 eutrophication?

13 A. Yes.

14 Q. Have your studies and the work you have done since you
15 began in the watershed in 1992 given you specialized knowledge
16 and experience about how nutrients, particularly phosphorus,
17 behaves in the soil, at least as it regards phosphorus's
18 tendency to cause nonpoint source pollution?

19 MR. GREEN: Objection. I have several objections.

20 THE COURT: Yes, sir.

21 MR. GREEN: One is that that sounds like a perfectly
22 eloquent leading question. But in addition to that, this
23 witness appears now to be asked questions which are seeking to
24 elicit specific expert opinions which have not been identified
25 and which we are not on notice with respect to specific expert

1 opinions, and I object on that ground as well.

2 THE COURT: This witness has not been identified as
3 an expert for trial?

4 MR. NANCE: As a matter of, fact she has been
5 identified as a nonretained expert in our disclosure letter of
6 April 1, 2008. She's the second name on the list.

7 MR. GREEN: That does not relieve -- I do not
8 believe, that does not relieve counsel or plaintiffs from the
9 burden of specifying what particular opinions they will seek to
10 elicit from her.

11 THE COURT: Correct. There was no disclosure?

12 MR. GREEN: Not that I know of.

13 MR. TUCKER: Your Honor, I would join in that
14 objection. And I would suggest to the Court that the -- this
15 witness was first identified on the Rule 26 disclosure.
16 Perhaps I should come where you can hear me better.

17 THE COURT: If you'll approach, Mr. Tucker, you can
18 share the mic with Mr. Nance. I'm just trying to get to the
19 very fundamental question of whether or not proper disclosure
20 of these expert opinions has been made prior to trial.

21 MR. TUCKER: This was a disclosure of Ms. Phillips in
22 the Rule 26 disclosure as a witness.

23 "Shanon Phillips was a writer, work plan development
24 specialist and data analyst until a month ago. She is now
25 division assistant director. She can speak to the statistical

1 and ecological meaning of data, cost of implementation and
2 structure of our relationship with various federal and state
3 agencies and programs.

4 "Subsequently, in April of 2008, the State identified
5 expert witnesses and a list of nonretained witnesses who may
6 offer expert testimony. At that point, Shanon Phillips was
7 identified as having expertise in nonpoint source pollution,
8 water quality, current historical Illinois River Watershed
9 pollution, effects of remedies and programs on water quality."

10 Our first position is that we believe that with
11 respect to her -- the area in which she can testify as a
12 witness, that was identified in Exhibit A of the Rule 26
13 disclosures. To the extent that the State may contend that the
14 April 1, 2008 enumeration of those topics which I just read to
15 you are sufficient to encompass the testimony that she's being
16 asked to give here, then it is our contention that under
17 Rule 26, she has become a witness who has been asked to -- the
18 equivalent of a specially retained witness, which requires a
19 Rule 26 report from her.

20 Any way you look at it, it comes back to the point of
21 Mr. Green, that there's been no disclosure of the opinions that
22 she intends to give.

23 THE COURT: Mr. Nance.

24 MR. NANCE: Your Honor, she is -- she is not a
25 specially retained expert. She's been an employee of the State

1 of Oklahoma for 17 years doing water quality work in the
2 Illinois River Watershed. I'm going to lay a foundation for
3 her expertise, but there's nothing -- there's nothing in the
4 rule that requires a Rule 26 report comparable to a retained
5 expert for a nonretained expert like Ms. Phillips.

6 THE COURT: Rule 26(a)(2) doesn't make a distinction,
7 does it, between nonretained experts and retained experts? It
8 simply says that you've got to accompany disclosure with a
9 written report, correct?

10 MR. NANCE: Actually, (2)(B), Your Honor, the written
11 report section, says, "Unless otherwise stipulated ordered by
12 the court, disclosure must be accompanied by written report,
13 prepared and signed by the witness, if the witness is one
14 retained or specially employed to provide expert testimony in
15 the case or one whose duties as the party's employee regularly
16 involve giving expert testimony."

17 THE COURT: You're saying although her duties are as
18 the State's employee, it doesn't regularly involve giving
19 expert testimony?

20 MR. NANCE: That is correct. She's never given
21 expert testimony. I will develop what she has done, but she
22 has never given expert testimony in court prior to today.

23 THE COURT: Did this issue ever come before the
24 magistrate judge or any of the magistrate judges that have been
25 assigned to this case?

1 MR. NANCE: I don't believe so. Your Honor, there
2 was a motion in limine that dealt with certain other
3 nonretained experts which was withdrawn by the defendants.
4 There was no motion made on Ms. Phillips at all. And we
5 believe that we have satisfied our burden of disclosure in our
6 April 1, 2008 letter, which I can hand a copy up to you if you
7 would like to see it.

8 THE COURT: Yes, please.

9 MR. NANCE: In that letter, Your Honor, we listed,
10 beginning on the second page, a list of retained expert
11 witnesses who would provide Rule 26 disclosures, beginning with
12 Darren Brown and running through Dr. Winn, who I don't think
13 panned out, but others on that list.

14 Then we gave the second list beginning on page 3 of
15 nonretained witnesses who may offer opinion testimony. And
16 you'll see that Ms. Phillips was so disclosed, as were the
17 general areas of her expertise.

18 Rule 26(2)(A) requires identification of a witness
19 that may be used at trial to present opinion testimony. We
20 identified her and we gave the area of her expertise. But
21 under -- the formal written report is only required under --

22 THE COURT: I understand. You've made your point.
23 Anything further?

24 MR. NANCE: Nothing further on that, Your Honor.

25 THE COURT: Surely we're not going to have this many

1 nonretained expert witnesses, three pages of them, correct?
2 We'll be here until next June.

3 MR. NANCE: We will not be here until next June. We
4 will not have nearly that many, Your Honor.

5 THE COURT: All right. Mr. Tucker.

6 MR. TUCKER: Notice how well we are sharing this
7 podium, by the way, Your Honor.

8 THE COURT: You-all are doing very well.

9 MR. NANCE: We try to play well with others,
10 Your Honor.

11 MR. TUCKER: Well, that's better than too much gray
12 hair, I guess.

13 Your Honor, the point I'm trying to make is this.
14 Certainly Section (2)(B) is the applicable section. The
15 disclosure that was made -- let me, if I may, hand this up. I
16 realize you don't want to search on your computer. If you'll
17 look at the disclosure made on the Rule 26 initial disclosures
18 list for Shanon Phillips, those topics of testimony are the
19 things that Ms. Phillips has identified as what her duties and
20 responsibilities are in her deposition and, to less extent, in
21 this Court here today.

22 She has identified that since that time, since she's
23 no longer assistant director, but now director, she has layered
24 on more administrative responsibilities that she didn't have
25 before.

1 But the point I'm trying to make is that in April,
2 2008 when they decided to make her a Rule 26(b) witness, the
3 test you then have to look at is, is what the person is being
4 asked to testify about what they do every day on the job, are
5 they being listed to talk about things for the purposes of this
6 trial. Because it's the substance of the expert's testimony,
7 not the fact that they're an employee that determines whether
8 they get converted to a Rule 26(A) expert for purposes of
9 requiring the report.

10 If you will look at the topics that are added in
11 26 -- on April 1 of 2008, it is our belief, for example, the
12 question that's pending before her -- toward her right now has
13 to do with soil behaviors and soil science behaviors and soil
14 chemistry, which is clearly not something that is part of her
15 regular duties which were set out in the Rule 26 disclosure.

16 So it's our belief that when they chose to add these
17 other categories to the area of her testimony, that that made
18 her a person who, under Rule 26(B), is one who is considered by
19 the law to be retained or specially employed. That doesn't
20 mean she can't testify. That just means if she wants to give
21 those kind of opinions, she then is required to give a Rule 26
22 report, and that has not happened.

23 THE COURT: As I'm reading 26(B), however, the
24 written report must be given in the event the individual is
25 employed by the party in those cases where one of the duties as

1 the party's employee regularly involves the giving of expert
2 testimony -- we haven't broached that subject with her here.
3 I'm assuming that is not the case, but that remains to be seen.

4 MR. TUCKER: I believe that is correct.

5 THE COURT: Otherwise, it would appear that the
6 question really becomes now whether or not the testimony that's
7 being elicited by the question before the Court is contained in
8 the description of her expertise of April 1, 2008, correct?

9 MR. TUCKER: That's the first half of the question.
10 The second half of the question -- of it is -- I'll get my
11 grammar straight here in a minute maybe.

12 The second half of the question is when the
13 additional categories were added in April 1 of 2008, does that
14 meet the indicia that's required for determining whether the
15 witness has become retained or especially employed under the
16 meaning of Rule 26.

17 Your Honor, we have -- and this has not been
18 presented before -- although maybe an inconvenience, it may
19 have been better -- because we were uncertain whether she would
20 actually be asked opinions that would be outside the scope of
21 what was listed in the Rule 26 disclosure of actually what her
22 job consists of. I mean Rule 26 -- the Rule 26 initial
23 disclosure, which is actually what her job is.

24 MR. NANCE: What her job is is what she testified her
25 job was.

1 THE COURT: I'm reading, and perhaps because I'm
2 reading this cold, I'm not reading it as you are, Mr. Tucker,
3 but it has the disjunctive "or." If the witness is one
4 retained or specially employed to provide expert testimony in a
5 case -- which is not the case -- or the disjunctive, one whose
6 duties as the party's employee regularly involve giving expert
7 testimony...

8 So the fact that she was identified on April 1, 2008
9 doesn't mean that she's in the first category. I suppose it
10 may raise the question as to whether or not she was converted
11 as of April 1, 2008 to an employee whose duties regularly
12 involve giving expert testimony, but if this is her first time,
13 then it doesn't appear that she falls within that category.
14 Correct?

15 MR. TUCKER: If I might suggest -- and believe me,
16 I'm not pretending to be Jay Jorgensen. I've only been to the
17 Supreme Court once, and that was for dinner. And I had to pay
18 to do that. But it's quite interesting, but I don't pretend to
19 be a legal scholar. But this whole concept of a nonretained
20 expert, to me, when I read it, I read just as you read. Well,
21 how could it be a specially retained expert because they
22 already worked for them. So I asked my smart friends to
23 prepare a bench brief on that -- if I might offer that to the
24 plaintiff and to the Court -- which explains that the plain and
25 simple meaning of the words is not the way -- and it is in the

1 disjunctive, and that's why we believe that under the cases
2 that have been cited, Rule 26 questions like this, that
3 probably the law light version of looking at it would be to say
4 that if what she's talking about is what she does every day in
5 her job, even though there may be some opinion testimony mixed
6 in with it, like the doctor testifying about the patient that
7 he treats, then that's considered to be a nonretained expert.
8 No problem.

9 If, on the other hand, like a doctor that's asked to
10 review the findings of another doctor, even though it may be
11 the same topic, that converts the doctor to a nonretained
12 expert -- or to a specially retained expert.

13 It's our position that when her responsibilities for
14 testifying went beyond her Rule 26 disclosures in 2006, that
15 was -- that was when they converted her. If she's to testify
16 on those topics, that's when the State chose to convert her
17 because she was now being asked to give opinions about things
18 for the purposes of this litigation.

19 THE COURT: I can't say that as I sit here right now,
20 I'm particularly convinced.

21 Let me just ask you, Ms. Phillips, because I don't
22 know if the question has been asked: Have you ever given
23 expert testimony in any other lawsuit?

24 THE WITNESS: No.

25 THE COURT: All right. Are your duties described

1 such as to require you to regularly give expert testimony?

2 THE WITNESS: No.

3 THE COURT: All right. Let me see if I can speed
4 read your bench brief here of six pages.

5 MR. TUCKER: Mr. Jorgensen has arrived and -- he got
6 to have lunch there without having to pay for it.

7 MR. GREEN: Would you allow me?

8 THE COURT: When I went up there last, I took my twin
9 boys, and they put us as close to the edge as possible and put
10 one of the administrators there to make sure my twin boys
11 wouldn't misbehave.

12 Let me read this quickly, and it will give me a
13 chance. If memory serves me correct, I think they served
14 chicken.

15 All right. Mr. Tucker, given the fact that this
16 witness did her master's thesis on a related subject, her
17 proposed testimony takes her out of the situation that was
18 presented apparently in B.H. v. Gold Fields Mining Corp.
19 correct, where the individual was determined to be a
20 nonretained expert, but was apparently specially employed for
21 purposes of the case?

22 Here, arguably, it's distinct. She has a basis of
23 knowledge derived, at least in part, from her master's thesis
24 done at the Oklahoma State University by which she could fall
25 within the definition set forth in B.H., correct?

1 MR. TUCKER: Under your analysis, Your Honor, because
2 it was her master's thesis, she might well have the ability to
3 satisfy the Daubert test and then testify as an expert. But
4 that issue that's covered in her master's thesis is not what
5 her job is. The question really is, is she testifying and
6 giving opinions that naturally follow -- are the kind of
7 opinions she gives every day in her job, is that the work that
8 she normally does, or does this question relate to a special
9 tasking; that is to say, an opinion she doesn't give in the
10 course of her everyday employment. That's what's been asked
11 here.

12 The no discussion about her being involved in soil
13 science as a part of her everyday employment and her master's
14 thesis, on the other hand, may well qualify her, but not
15 without a report.

16 MR. JORGENSEN: If I might, Your Honor.

17 THE COURT: You're being double-teamed here,
18 Mr. Nance.

19 MR. NANCE: Looks like triple team.

20 THE COURT: Well, you sued multiple defendants.
21 Mr. Tucker's talking for Cargill and Mr. Jorgensen for Tyson.

22 MR. JORGENSEN: It is kind of complex. The issue
23 here is -- and I'm glad you're taking time on it because it's
24 not a one-witness issue. I think this is going to be a
25 recurring issue in this case.

1 THE COURT: Obviously. I've got three pages.

2 MR. JORGENSEN: So we've objected all along and not
3 thought that this was an appropriate way to go. Now it's
4 finally come to a head.

5 In Rule 26 -- and, again, we're talking about 2(B) --
6 the issue is which people have to give a written report.
7 Daubert -- who has to give a written report.

8 THE COURT: But it has to be made, would you agree,
9 on a witness-by-witness basis?

10 MR. JORGENSEN: Yes.

11 THE COURT: It can't be a blanket determination.

12 MR. JORGENSEN: No, and that's why we did not file --
13 I believe it was mentioned that we had filed an omnibus brief,
14 and that's it has to be done witness by witness.

15 What Mr. Tucker says is absolutely right. If you go
16 to 26(2)(B), it has three "ors" in it, which makes it very
17 convoluted. But we can break them out.

18 So who has to give a written report in order to be
19 able to testify under Rule 26? If the witness is one
20 retained -- let's just stop there. That's the first "or." If
21 you're being paid in the case -- and the cases that Mr. Tucker
22 has set out in his brief say it doesn't have to deal with
23 money -- but if you're being paid to give testimony, then you
24 have to give a report. Let me just respectfully submit I don't
25 think that's this witness.

1 THE COURT: It's not.

2 MR. JORGENSEN: Then there's "or," or specially
3 employed. Now, the cases that Mr. Tucker has set out in his
4 brief focus on specially employed. If you specially employ,
5 these cases say, does not have to involve any giving of money;
6 it has to do with are you going about your daily life like a
7 treating physician -- and that's where these cases really come
8 up the most, Your Honor.

9 If you're the treating physician in an ER and a
10 person comes in and you treat them and then, later, you're
11 asked in court to say what you did, you're an expert in when
12 you did. You're not being specially employed for this
13 litigation. You were just doing your job, and you're just
14 giving testimony about your job. You're not being specially
15 employed to provide expert testimony.

16 So where the problem comes -- and you do see this in
17 the cases about the treating physician -- treating physician
18 will come in, and the treating physician has been asked to say
19 what caused the accident as opposed to what they just did in
20 the course of their job. Then the courts say it doesn't matter
21 whether you're getting paid, that's totally separate. It
22 doesn't matter -- the third "or" -- whether you normally give
23 expert testimony as part of your job. That's separately. The
24 specially retained is its own standalone. And if you're coming
25 in as a doctor to give causal testimony, that's not what you do

1 every day in the ER room. You treat people. So now you've
2 been specially employed for purposes of this litigation, and
3 you need to give a report.

4 So Mr. Tucker is exactly right. That's the
5 breakdown. It has to be witness by witness. Are they talking
6 about what they do every day with the expertise they have? As
7 you pointed out, witnesses will come in; the job that they
8 have, they have to have a certain training in order to be able
9 to do that job. So that's a separate issue. In the training
10 that they do and the job that they do every day, is that what
11 they're being asked to do, or are they being asked to give some
12 expert testimony that's beyond what they do every day. If it's
13 beyond what they do every day, then they are specially employed
14 to provide expert testimony in this case.

15 THE COURT: So your argument is she falls within the
16 second disjunctive "or."

17 MR. JORGENSEN: As to soil science, I would say yes,
18 unless that's what she does every day with her expertise and
19 the training you've mentioned in her everyday job.

20 It's so complex, but let me lay on one more layer,
21 and that's what Mr. Tucker has mentioned about the disclosures.
22 It doesn't say "soil" in what she was disclosed to us.

23 THE COURT: It says nonpoint source pollution.

24 MR. JORGENSEN: Which I understand from the recent
25 testimony does not involve cattle.

1 THE COURT: I'm sorry?

2 MR. JORGENSEN: That was a lame attempt at a joke in
3 the document that said --

4 THE COURT: Late-in-the-day humor.

5 MR. JORGENSEN: I apologize.

6 THE COURT: The question before the Court is: Have
7 your studies and the work you've done since you began in the
8 watershed in 1992, given your specialized knowledge and
9 experience about how nutrients, particularly phosphorus,
10 behaves in the soil, at least as it regards phosphorus'
11 tendency to cause nonpoint source pollution...

12 As I understand, your argument, Mr. Nance, is her
13 specialized knowledge is, and her training and her research is
14 about how nutrients, including phosphorus, behaves and
15 specifically regarding phosphorus' tendency to cause nonpoint
16 source pollution; is that correct?

17 MR. NANCE: Correct, Your Honor. She is not a Ph.D.
18 soil chemist, but she does know, and from her work, how
19 phosphorus behaves as a nonpoint source pollutant. And under
20 702, she is qualified by knowledge, skill, experience, training
21 or education to speak to that limited amount of phosphorus in
22 soil behavior. I'm sure there's a very elaborate soil
23 chemistry that other people can talk to you about if you want
24 to hear it later on.

25 THE COURT: How do you respond specifically to their

1 argument that she falls within the second disjunctive "or," as
2 now, even though she works here for the Conservation
3 Commission, that she is specially employed now to provide
4 expert testimony with regard to soil science, which is not --
5 which is not, they contend, within the definition of her
6 opinion testimony when you identify nonpoint source pollution?

7 MR. NANCE: Well, taking the second point first,
8 Your Honor, how phosphorus behaves as a nonpoint source
9 pollutant is certainly within the topic of nonpoint source
10 pollution. It is certainly within the topic of current and
11 historical Illinois River Watershed pollution, and it certainly
12 has an effect or remedy on what programs are necessary to
13 remediate water quality.

14 This is a phosphorus case, among other things.
15 There's a bacteria component, but she's not -- she's not
16 talking about that. Unlike -- it's been a while since I've
17 read B.H. v. Gold Fields, but I believe they had someone there
18 who was specially brought on board to testify.

19 If you have a question in your mind, we'd like to
20 address this with a brief in the morning.

21 THE COURT: To tell you the truth, I really don't. I
22 think the -- from what I understand -- and I'm being hit
23 somewhat cold with it -- but my understanding is that she does
24 not fall within this second disjunctive "or." The objection is
25 overruled. She may answer.

1 MR. TUCKER: May I interpose a second objection?
2 Notwithstanding the fact that she may be qualified as a
3 nonretained expert to testify, the defendants would object to
4 her testifying because she does not satisfy the Daubert
5 criteria to testify on the opinions she's been asked to be
6 giving. A master thesis in and of itself with nothing more,
7 standing alone, is not going to support that.

8 THE COURT: I wondered when that would come. Your
9 response, Mr. Nance?

10 MR. NANCE: Seems a little early to be raising that.

11 THE COURT: Early or late?

12 MR. NANCE: It's late in terms of a motion in
13 limine. She was deposed three times in this case. They could
14 have deposed her yet again if they wanted to know about her
15 expertise.

16 THE COURT: She was deposed three times?

17 MR. NANCE: Three times in this case, each on
18 separate aspects of the case.

19 THE COURT: After April 1, 2008?

20 MR. NANCE: The major substantive one would have been
21 before the PI. But they had a year to do it after April 1,
22 2008 to get in if they wanted to. They did a deposition of her
23 on broad-ranging subjects before the preliminary injunction
24 hearing.

25 It's either too late to do a Daubert motion, because

1 the Court set a deadline for that, and deadlines and lines mean
2 something. I have not yet asked her for an opinion.

3 THE COURT: You're right. You're just trying to
4 establish the foundation whether her studies and her work that
5 she's done in the watershed since 1992 have given her
6 specialized knowledge and experience about how phosphorus
7 behaves in the soil, especially as it regards phosphorus'
8 tendency to cause nonpoint source pollution.

9 MR. NANCE: Clearly, Rule 702, in its plain terms,
10 and in the cases that I have looked at but do not have with me,
11 you don't have to have a doctorate or a Ph.D. to give an expert
12 opinion. You can be qualified by, as the rule itself says,
13 knowledge, skill, experience, training or education. And she
14 does have considerable formal education, but she has enhanced
15 that a great deal over the years.

16 MR. JORGENSEN: If I might, Your Honor, then I'll sit
17 down. We're, once again, mixing two distinct concepts.
18 There's Rule 702 qualification of an expert: Can you give
19 testimony? That's what's just been spoken. Then there's
20 Daubert : What is your methodology for arriving at the
21 conclusion you are about to give, and is that methodology
22 subject to the four factors?

23 I'll sit down, Your Honor, but I will just say, going
24 forward, what we need to look for with each of these numerous
25 nonretained witnesses is going to be a foundation that they are

1 testifying only to subjects and work that they do in their
2 normal course, and that they didn't do anything -- they weren't
3 asked to do anything to get ready for this case. That moves
4 you into specially employed. And then, separately, a
5 foundation --

6 MR. NANCE: We disagree with that particular
7 argument. The Court should know that. I don't mean to
8 interrupt, but I don't want my silence to be acquiescence to
9 that.

10 MR. JORGENSEN: Separately, a foundation for what
11 your facts and methodology are before the conclusion, because
12 the cases are very clear, Daubert can be raised at any time and
13 should not be raised in the abstract.

14 THE COURT: All right. So with regard to both 702
15 and Daubert, we have yet to see whether this witness qualifies,
16 but as to the question objected to, that objection is
17 overruled.

18 You've probably forgotten the question. Let me read
19 it to you, because it's way back in the transcript. And it is
20 this: Have your studies and the work you've done since you
21 began in the watershed in 1992 given you specialized knowledge
22 and experience about how nutrients, particularly phosphorus,
23 behaves in the soil, at least as it regards phosphorus'
24 tendency to cause nonpoint source pollution?

25 Now that's not asking you for your opinion but,

1 rather, whether you have specialized knowledge and experience
2 as to that subject.

3 THE WITNESS: Yes.

4 THE COURT: Mr. Nance.

5 Q. (By Mr. Nance) Has your work with the Conservation
6 Commission given you specialized knowledge and experience about
7 the conservation measures that are appropriate to combat
8 nonpoint source pollution, at least as regards the Illinois
9 River Watershed?

10 A. Yes.

11 Q. Have you received any additional training or education in
12 your field since you left your Ph.D. work at Oklahoma State?

13 A. Yes.

14 Q. What additional training and education have you received?

15 A. I've had classes in conservation plan writing from the
16 NRCS in quality assurance, quality control from EPA, in soil
17 and water assessment tool, water quality modeling, in fluvial
18 geomorphology, and in the development of watershed base plans.

19 Q. Would you tell us briefly what fluvial geomorphology is.

20 A. Fluvial geomorphology is the study of the natural
21 processes by which rivers transport both volumes of water and
22 pollutants.

23 Q. When have you last performed any sampling or field work
24 testing yourself?

25 A. The last field work that I did was probably around 1998 or

1 1999, approximately.

2 Q. Where did you do that work in 1998 or '99?

3 A. In the North Canadian River Watershed and the Wister Lake
4 Watershed.

5 Q. When did you last personally do any field work in the
6 Tenkiller or Illinois River Watershed?

7 A. Approximately 1995 or 1996.

8 Q. Please tell the Court what your most recent sampling or
9 field work experience -- what kind of things did you do?

10 A. We were doing diurnal studies of water quality, both at
11 high-flow and low-flow periods, for purposes of total maximum
12 daily load calibration.

13 Q. What's diurnal mean?

14 A. That means that you sample throughout the period of the
15 day, both during the daylight hours and nighttime hours, so
16 that you get a measure of both the effects of photosynthesis
17 and respiration on water quality.

18 Q. In your work with the Conservation Commission, have you
19 directed any sampling or testing programs?

20 A. Yes.

21 Q. Would you describe those programs for the Court, please.

22 A. The purposes of our monitoring is to assess the overall
23 status of the state's waters as they are affected by nonpoint
24 source pollution. And then we also design monitoring programs
25 to evaluate the effect of our best management implementation

1 programs.

2 Q. So would that be just the water quality status and then
3 does your fix work? Am I understanding that correctly?

4 A. Yes.

5 Q. Or how well does it work?

6 A. Yes.

7 Q. How do the people working under your direction do this?
8 Do they go out and grab water samples or do they do other
9 things? Just generally describe the kind of things they do.

10 A. We rely on a network of automated samplers in our
11 watersheds where we are implementing Best Management
12 Practices. Those collect samples on a continuous flow-weighted
13 basis that really give us, on a weekly basis, a picture of the
14 actual load that's being contributed for our pollutants of
15 concern.

16 We follow those up with weekly grab samples that
17 assess a more instantaneous information for parameters that
18 can't accurately be measured over time from a weekly composited
19 sample. So that would be some of the dissolved parameters that
20 dissolve nutrients, dissolve oxygen, temperature, those type of
21 parameters that would change and be affected by being held in a
22 sampling container for a period of a week.

23 We also collect twice yearly benthic
24 macroinvertebrate collections. Those are aquatic insects.

25 Then we do in our standard sampling, either every two

1 or three years, fish collections and habitat assessments.

2 Q. Ms. Phillips, in your work at the Conservation Commission,
3 is it your responsibility to review scholarly articles about
4 water quality and nonpoint source nutrient pollution?

5 A. Yes.

6 Q. How often do you do that?

7 A. It varies. But I receive e-mails daily that list studies
8 that need to be assessed, and I would estimate I look at two to
9 three studies a week, at least.

10 Q. Do you discuss those studies with your staff and with
11 other peers and state agencies?

12 A. Yes.

13 Q. And when you can find them, do you review particularly
14 scholarly articles about water quality or nonpoint source
15 pollution in the Illinois River Watershed?

16 A. Yes.

17 MR. TUCKER: Object as leading.

18 THE COURT: Sustained.

19 Q. (By Mr. Nance) Does your study include articles about the
20 Illinois River Watershed?

21 A. Yes.

22 Q. Is it important to study the scholarly articles to do your
23 job in drafting plans and assessing the success of the plans of
24 the agency?

25 A. Yes.

1 Q. Do you review reports on nonpoint source pollution that
2 are generated or drafted by other state agencies?

3 A. Yes.

4 Q. And is there any formal way to discuss those with your
5 peers in other agencies as they come around?

6 A. Yes.

7 Q. What is that, please?

8 A. The Office of the Secretary of Environment maintains a
9 peer-review function. Anytime a report is generated with EPA
10 funding, it is distributed to the peer-review group. We
11 provide comments that are then sent through the Office of the
12 Secretary of the Environment back to the agency who developed
13 the document, and oftentimes they facilitate an exchange
14 directly between the two parties in order to resolve any
15 concerns or questions.

16 Q. In the course of your work for the Oklahoma Conservation
17 Commission, do you review government reports from federal
18 authorities or from other states?

19 A. Yes.

20 Q. Give me a for-instance of the kinds of reports you look
21 at.

22 A. For instance, if the State of Arkansas developed a
23 nonpoint source report about a watershed that we shared, we
24 would review that document. Oftentimes they send it to us
25 directly for our review. As an EPA program, we are responsible

1 for reviewing reports that they generate, and they often -- our
2 EPA partners often share that information with us and suggest
3 that we review those reports.

4 Q. Do you, from time to time, review pertinent reports that
5 are generated by the U.S. Geological Survey?

6 A. Yes.

7 Q. And are there a number of those that go around?

8 A. Yes.

9 Q. Do you, from time to time, review reports that come from
10 the United States Department of Agriculture that are pertinent
11 to nonpoint source pollution?

12 A. Yes.

13 Q. In the course of your work for the Oklahoma Conservation
14 Commission, do you review scholarly articles or government
15 reports about phosphorus transport, at least as it pertains to
16 being a nonpoint source pollutant?

17 A. Yes.

18 Q. Are there a number of those reports that, over the years,
19 have been circulated?

20 A. Yes.

21 Q. In the course of your work for the Oklahoma Conservation
22 Commission, have you reviewed scholarly articles, not
23 necessarily government reports but scholarly articles about
24 phosphorus buildup in the soil and how it can affect phosphorus
25 as a nonpoint source pollutant?

1 A. Yes.

2 Q. Are there any particular reports or authors that you have
3 read over the years?

4 A. Dr. Andrew Sharpley, Dr. Dan Storm and his students,
5 Dr. Mike Smolen.

6 Q. Have you spoken personally with experts on phosphorus
7 transport in addition to just reading articles, either
8 government articles or scholarly articles?

9 A. Yes.

10 Q. With whom have you conferred on these sort of issues as
11 you needed to?

12 A. Dr. Dan Storm, Dr. Mike Smolen, Dr. Brian Haggard, others,
13 but I can't think of any --

14 Q. Have you spoken with Dr. Hailin Zhang?

15 A. Yes.

16 Q. Tell the Court very briefly who those people are, and then
17 we'll just move on. Who is Dr. Hailin Zhang?

18 A. He is a soil specialist at Oklahoma State University. He
19 runs their soils lab. And we and other state agencies often
20 send their soil samples to his lab for analysis.

21 Q. Who is Dr. Mike Smolen?

22 A. Dr. Mike Smolen is a water quality specialist with
23 Oklahoma State University Extension Service. And his area of
24 specialty is nonpoint source pollution and its effect on water
25 quality. Many of their programs focus on education of citizens

1 about nonpoint source pollution.

2 Q. Who is Dr. Brian Haggard?

3 A. He is a professor at the University of Arkansas, and he
4 and I were in school together. He is currently working on a
5 watershed base plan for the Illinois River for the State of
6 Arkansas.

7 Q. Do you confer with him on that from time to time?

8 A. From time to time.

9 Q. Who is Dr. Dan Storm?

10 A. Oklahoma State University professor in the department of
11 biosystems and agricultural engineering. His expertise is
12 water quality modeling.

13 Q. In the course of your work for the Oklahoma Conservation
14 Commission, have you reviewed scholarly articles or government
15 reports about the time required for elevated phosphorus content
16 in soils to diminish?

17 A. Yes.

18 Q. And would those be perhaps articles by some of the people
19 you've already discussed?

20 A. Yes.

21 Q. And without getting into detail, in dealing with nonpoint
22 source pollution, are the buildup and transport of phosphorus
23 from land-applied wastes, particularly in the Illinois River
24 Watershed, important topics in your professional work?

25 A. Yes.

1 Q. And why is that?

2 A. The purpose of our program is to demonstrate the things
3 that are necessary to reduce the impacts of nonpoint source
4 pollution. And if we are going to successfully demonstrate
5 those practices, we need to know how phosphorus can be
6 processed through the watershed and transported through the
7 watershed.

8 Q. Have you done teaching or lecturing in the field of water
9 quality or nonpoint source pollution?

10 A. Yes.

11 Q. What have you done?

12 A. I've made presentations to university classes. I've also
13 been asked to make presentations to EPA at EPA training
14 symposiums about our work.

15 Q. Have you made public presentations or demonstrations
16 within the field of nonpoint source pollution or water quality?

17 A. Yes.

18 Q. What have you done in terms of public presentations?

19 A. We periodically hold public meetings to update citizens in
20 our watershed programs about what's going on with a project,
21 our success, and to educate them about what our programs have
22 to offer. We have participated with the DEQ through their TMDL
23 public meeting process. Those are the main examples I can
24 think of.

25 Q. Have you made presentations to the legislature or to

1 legislative committees?

2 A. Yes.

3 Q. What have you done before the legislature?

4 A. We have summarized the results of our demonstration
5 projects to the legislature and to Senate finance committees.

6 Q. Okay. Have you helped prepare any materials to be
7 presented to the United States Congress?

8 A. Yes.

9 Q. Tell us about that, please.

10 A. We've prepared -- I've overseen and worked to prepare
11 materials to Congressional -- or Congressional delegations to
12 update them on the successes of our nonpoint source program in
13 Oklahoma and to encourage them to continue to support the 319
14 program.

15 Q. Are you a member of any governmental working groups that
16 deal with issues of water quality or nonpoint source pollution?

17 A. Yes.

18 Q. Which working groups are those, please?

19 A. I'm currently most active in the Total Maximum Load
20 Working Group. I have, in the past, participated in the Water
21 Quality Standards Working Group and the Integrator Report
22 Working Group. I am also, as the director of the Water Quality
23 Division, the chair of the Nonpoint Source Working Group.

24 Q. What's the Nonpoint Source Working Group, please?

25 A. The Nonpoint Source Working Group is a group of state,

1 federal, local entities who all have a role in the state's
2 nonpoint source program. The initial intent of the working
3 group was to help design our State's nonpoint source management
4 plan that lays out the strategies we'll use to address nonpoint
5 source pollution in the state.

6 Q. Are you a member of any professional societies dealing
7 with water quality?

8 A. Yes.

9 Q. What is that, please?

10 A. The Oklahoma Clean Lakes and Watersheds Association.

11 Q. Have you made any presentations to any other professional
12 societies?

13 A. Yes.

14 Q. Can you give us a for-instance about that.

15 A. The -- ASIWPCA, which is the Association -- I can't
16 remember what it stands for. The American -- the AWRA, various
17 nonpoint source EPA meetings, the North American Lake
18 Management Society meetings.

19 Q. Have you published any scholarly articles on water quality
20 or nonpoint source pollution topics?

21 A. Yes.

22 Q. Tell us about that, please.

23 A. I was the primary author on a study published out of my
24 thesis that was published, I believe, in the Journal of
25 Freshwater Ecology about nutrient limitation in Lake

1 Tenkiller. I've also been coauthor on studies related to some
2 of our projects and the work that we've done with Dan Storm in
3 the Lake Wister Watershed.

4 Q. Have you written any governmental reports on water quality
5 or nonpoint source pollution?

6 A. Yes.

7 Q. How many have you written?

8 A. Dozens.

9 Q. How many of those deal with the Illinois River Watershed?

10 A. At least five or six.

11 Q. Have you edited any governmental reports of water quality
12 or nonpoint source pollution?

13 A. Yes.

14 Q. Would that be in the Secretary of Environment's peer-
15 review process you mentioned earlier?

16 A. Under that process.

17 Q. Do you still do that as Director of Water Quality?

18 A. Yes.

19 THE COURT: Mr. Nance, you might want to find a
20 appropriate stopping point, sir.

21 MR. NANCE: No time like the present.

22 THE COURT: Very well. We'll be --

23 MR. GREEN: Your Honor, before you adjourn --

24 THE COURT: Yes, sir.

25 MR. GREEN: With your permission, I would like to

1 suggest that when we reconvene tomorrow, you consider giving us
2 a short opportunity to voir dire on the witness' both
3 qualifications and where we're going.

4 THE COURT: I understand. That may be an appropriate
5 situation with regard to these nonretained experts.
6 Particularly -- no, I understand. Any objection to that
7 approach, Mr. Nance?

8 MR. NANCE: No, Your Honor. I have a little bit more
9 to complete, but I anticipated a voir dire would be requested.
10 May I make a suggestion?

11 THE COURT: Yes, sir.

12 MR. NANCE: I think that the issue of the 803(8)
13 hearsay objection for government reports is going to be a
14 continuing issue. I think now you have bench briefs from both
15 sides.

16 THE COURT: I do.

17 MR. NANCE: Would it be helpful to the Court to
18 entertain a brief argument on that subject?

19 THE COURT: Tomorrow morning.

20 MR. NANCE: Tomorrow morning sounds good to me. In
21 that connection, if it's not too bold, we'd invite your
22 attention to the Beech Aircraft case which is cited in our
23 brief.

24 THE COURT: Thank you very much. We'll see you
25 tomorrow morning.

1 (Whereupon the evening recess was had.)

2 REPORTER'S CERTIFICATE

3 I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT
4 TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE-ENTITLED
5 MATTER.

6

7 S/Terri Beeler
8 Terri Beeler, RMR, FCRR
9 United States Court Reporter

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